CLERK'S COPY.

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 20

EARLE & STODDART, INC., ET AL., OWNERS OF CARGO ON STEAMSHIP "GALILEO", PETITIONERS,

vs.

ELLERMAN'S WILSON LINE, LTD., OWNER OF STEAMSHIP "GALILEO"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1932

CERTIORARI GRANTED APRIL 18, 1932

(36,623)

(36,623)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 20

EARLE & STODDART, INC., ET AL., OWNERS OF CARGO ON STEAMSHIP "GALILEO", PETITIONERS,

vs.

ELLERMAN'S WILSON LINE, LTD., OWNER OF STEAMSHIP "GALILEO"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

VOL. I

INDEX

	Original	Print
Record from district court of the United States, Southern New York	1	1
Docket entries	1	1
Libel	4	3
Interrogatories annexed to the libel to be answered by the respondent	37	26
Exhibit A—Bill of lading, dated August 26, 1926	45	31
Exhibit B—Bill of lading, dated August 21, 1926	46	32
Exhibit C—Bill of lading, dated July 17, 1926	47	33
Exhibit D—Bill of lading, dated September 7, 1926	48	34
Exhibit E—Bill of lading, dated August 16, 1926	49	35
Exhibit F—Bill of lading, dated August 29, 1926	50	36
Exhibit G—Bill of lading, dated August 6, 1926	51	37
Exhibit H—Bill of lading, dated June 17, 1926	52	38

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1932

	Original	Print
Exhibit I—Bill of lading, dated August 20, 1926...	53	39
Exhibit J—Bill of lading, dated August 18, 1926...	54	40
Exhibit K—Bill of lading, dated August 13, 1926...	55	41
Exhibit L—Bill of lading, dated August 20, 1926...	56	42
Exhibit M—Bill of lading, dated August 17, 1926...	57	43
Exhibit N—Bill of lading, dated August 21, 1926...	58	44
Exhibit O—Bill of lading, dated August 21, 1926...	59	45
Exhibit P—Bill of lading, dated August 18, 1926...	60	46
Exhibit Q—Bill of lading, dated August 23, 1926...	61	47
Exhibit R—Bill of lading, dated August 18, 1926...	62	48
Exhibit S—Statement of shipments	63	50
Answer	67	51
Respondent's exceptions to interrogatories attached to libel	72	54
Order overruling respondent's exceptions to interrogatories attached to libel	73	54
Memorandum of Winslow, D. J., overruling respondent's exceptions to libellant's interrogatories	74	55
Respondent's answers to interrogatories attached to libel.	74	55
Order amending libel	89	64
Statement of evidence	91	65
Appearances	91	65
Testimony of Frank C. Weitzman	92	66
William R. Bagger	94	67
Horace C. Porter	126	92
S. W. Parr	209	156
Thomas L. Stanley	249	185
William G. McLennan	264	198
Frederick Ellison	276	207
Charles Barron	331	255
John Oxtoby	374	292
Gus Magarelli	416	328
John H. Neale	422	334
Harry J. Hicks	447	355
John H. Neale (recalled)	457	364
John S. Heck	459	366
Harry A. Huff	488	388
Robert H. Laverie	504	402
Robert S. Haight	516	412
Charles E. Ross	519	414
C. L. Burke	520	415
Fletcher H. Starr	539	429
William P. Brakenbury	566	451
Frederick Ellison (recalled)	601	480
William P. Brakenbury (recalled)	602	481
S. W. Parr (recalled)	603	482
Horace C. Porter (recalled)	627	500
Alfred E. Jordan	635	506
John L. Stanley (recalled)	647	515
Fletcher Starr (recalled)	649	517

Libellants' exhibits:	Original	Print
1—Photoprint of lower deck of "Galileo" between the No. 2 and No. 3 hatches looking forward, marked in evidence at folio 281	659	525
2—Photoprint, same as Exhibit 1 except that the view is toward the starboard side, marked in evidence at folio 285	660	526
3—Photoprint, same as Exhibit 1 except that the view is looking aft on the port side forward, marked in evidence at folio 287	661	527
4—Photoprint, same as Exhibit 1 but showing the compartment containing the sill piece, marked in evidence at folio 289	662	528
5—Photoprint, same as Exhibit 1 but showing the compartment with the caked coal and grease, marked in evidence at folio 290	663	529
6—Photoprint, looking down into the vessel thru the No. 2 hatch, marked in evidence at folio 292	664	530
7—Photoprint, view of the upper between deck compartment between No. 2 and No. 3 hatches, looking aft, marked in evidence at folio 293	665	531
8—Photoprint of the caked coal and grease in the No. 3 lower between deck, marked in evidence at folio 295	666	532
9—Photoprint, showing first, view of bridge looking forward, marked in evidence at folio 296	667	533
9a—Photoprint, view of No. 2 hatchway, taken from the bridge, marked in evidence at folio 296	668	534
9b—Photoprint, view of the fore deck, taken from forward of No. 1 hatch, marked in evidence at folio 296	669	535
9c—Photoprint, view of the after deck taken from the stern, marked in evidence at folio 296	670	536
9d—Photoprint, view of the engine and boiler room casings on vessel, marked in evidence at folio 296	671	537
9e—Photoprint, view of the after deck looking aft, marked in evidence at folio 296	672	538
9f—Photoprint, view of one of the holds looking down into the hatchway, marked in evidence at folio 296	673	539

	Original	Print
Libellants' exhibits:		
10—Photoprint of a sketch of the arrangement of the between decks of the steamship "Galileo", marked in evidence at 301	674	540
11—Photoprint, sketch, marked in evidence at folio 305	675	541
12—Photoprint, sketch of the deck plan of the lower between decks and shows the locations of the No. 2 hatch, No. 3 hatch, the grain feeder, wooden bulkhead, the ventilators and the passageways, marked in evidence at folios 306 and 321	676	542
13—Photoprint, sketch showing where the coal and cargo was, marked in evidence at folio 323	677	543
14—Letter, dated August 20th, 1927, and photoprints, three sheets, report, marked for identification at folio 360.	678	544
15—Radio messages, marked in evidence at folio 369	683	547
16—Report made by the chief engineer surveyor for Lloyds' Register of British and Foreign Shipping, on Spontaneous Combustion of Coal, dated London, May, 1912, only pages 16 and 17 of pamphlet printed, remainder omitted pursuant to stipulation, marked in evidence at folio 374	684	548
17—Official instruction issued by British Board of Trade, dated December, 1922, only pages 1, 2, and 3 up to paragraph 6 are printed, remainder omitted pursuant to stipulation, marked in evidence at folio 375	689	551
18—Photoprint of plan of the steamship "Galileo", marked in evidence at folio 412	693	554
19—Pamphlet, called "Fires in Steamship Bunkers and Cargo Coal", issued 1923, omitted pursuant to stipulation, marked in evidence at folio 597	694	
20—Stipulation of facts, marked in evidence at folio 827	694	555
21—Photoprint, sketch showing the position of the two pieces of wood which formed the slot, marked in evidence at folio 930	697	557

	Original	Print
Libellants' exhibits:		
22—Photoprint, bill of lading covering the shipment of 8 pieces of plates, signed by W. J. Chatfield, marked in evidence at folio 1299	698	558
23—Photoprint of invoice of the United States Steel Products Company, covering 8 pieces of steel, marked in evidence at folio 1300	699	559
24—Photoprint, stowage plan, marked in evidence at folio 1358	700	560
25—Photoprint, sketch, marked in evidence at folio 1434	701	561
26—Lloyd's Calendar, 1926, Fires in Bunkers and Coal Cargoes, Risks of Spontaneous Combustion, pages 267-269, remainder omitted pursuant to stipulation, marked in evidence at folio 1448	702	562
27—Photoprint of sketch, marked in evidence at folio 1534	707	566
28—Pamphlet by O. P. Hood on Factors in Spontaneous Combustion of Coal, 1922, omitted pursuant to stipulation, marked for identification at folio 1602 and marked in evidence at folio 1613	708	567
29—Printed herein at page 724 as Respondent's Exhibit 29	708	567
30—Photoprint, sketch, marked in evidence at folio 1920	709	568
Respondent's exhibits:		
A—Photoprints of mate's log book of "Galileo" covering period May 15, 1926, to August 22, 1926; page containing August 19 to August 22 photoprinted, remainder omitted pursuant to stipulation, marked in evidence at folios 878 and 976	710	569
B—Photoprints, log book, marked in evidence at folios 889 and 977	711	570
C—Photoprint, cablegram, dated June 23, 1926, marked in evidence at folio 1004	712	571
D—Photoprint, cablegram, dated August 20, 1926, marked in evidence at folio 1018	713	572
E—Photoprint, memorandum bearing Oxtoby's handwriting, marked in evidence at folio 1143	714	573
F—Photoprint of report, marked in evidence at folio 1159	715	574

	Original	Print
Respondent's exhibits:		
G—Photoprint, copy of letter delivered November, 1925, marked in evidence at folio 1184	716	575
H—Affidavit of Oxtoby re Magarelli story, omitted pursuant to stipulation, marked for identification at folio 1241	717	576
I—Photoprint, copy of voyage for June voyage, marked in evidence at folio 1284	718	576
J—Manifest of "Galileo" cargo for June, 1926, voyage, omitted pursuant to stipulation, marked in evidence at folio 1286	719	577
K—Photoprint of copy of agent's report for voyage 107, marked in evidence at folio 1289	720	577
L—Manifest for August voyage, omitted pursuant to stipulation, marked in evidence at folio 1291	721	578
M—Photoprint of certificate, marked in evidence at folio 1485	722	578
18b—Photoprint, original plan, marked in evidence at folio 1703	723	579
29—Photoprint, marked in evidence at folio 1808	724	580
Stipulation as to notice of claim	725	581
Memorandum by Coleman, J	726	582
Decree	741	591
Notice of appeal	747	596
Assignment of errors	748	597
Stipulation as to exhibits	780	619
Stipulation as to record	783	621
Clerk's certificate (omitted in printing)	784	
Supplemental transcript of record	785	621
Testimony of John J. Chapman	785	622
Respondent's Exhibit "A"—Memorandum as to coal	807	640
Respondent's Exhibit "B"—Plan of S. S. Marengo	808	640
Stipulation as to supplemental record	810	641
Proceedings in United States circuit court of appeals, second circuit	811	641
Opinion, Swan, J	811	641
Decree	819	647
Clerk's certificate (omitted in printing)	820	
Order allowing certiorari	821	648

[fols. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A96—206

EARLE & STODDART, INC., et al., Libellants,

against

ELLERMAN'S WILSON LINE, LTD., Owner and Operator of the Steamship "Galileo", Respondent

DOCKET ENTRIES

August 24, 1927.—Filed libel and stipulation for costs.

August 25, 1927.—Filed notice of appearance and stipulation for costs.

September 7, 1927.—Filed exceptions to interrogatories.

September 10, 1927.—Filed note of issue (motion of exceptions to interrogatories, Ret. 9/20/27).

September 30, 1927.—Filed Answer.

October 1, 1927.—Filed note of issue and notice of trial (November).

October 7, 1927.—Notice of motion on exceptions to interrogatories. Exceptions overruled. Winslow, J.

October 7, 1927.—Filed order overruling exceptions to interrogatories. Respondent to answer within 15 days. Winslow, J.

November 15, 1927.—Filed answers to libellant's interrogatories.

[fol. 2] October 25, 1928.—Filed order amending libel by striking out names of libellants: Anderson & Mishkin, Ltd., William S. Gray & Co., Herbert Smart & Co., Ltd., Barter Trading Co., Ltd., Henry Heide, Inc., British Merchants, Inc., Ltd., D. L. Sterling & Sons, Inc., John Travers & Son, Ltd., Bray Gibb & Co., Ltd., Robins Conveying Belt Co., Fraser & Chalmers Engineering Works, International Combustion, Ltd., Eugene Donzelot & Son, F. W. Berk & Co. Ltd., Haines Coote & Co., Henry W. Peabody; subparagraphs 133 to 150 of the first article and items 229 to 246, inclusive, of Exhibit S, and the damages demanded be reduced to $650,000.00. Mack, J.

May 20, 1929.—Order entered substituting Kirklin, Campbell, Hickox, Keating & McCrann.

November 6, 1929.—Frank J. Coleman, J. Case tried. Libellants, three witnesses and 18 exhibits. Respondent. Adjourned to November 7, 1929.

November 7, 1929.—Frank J. Coleman, J. Trial resumed. Libellants, three witnesses and 1 exhibit. Claimant. Adjourned to November 8, 1929.

November 8, 1929.—Frank J. Coleman, J. Trial resumed. Libellants, two exhibits. Respondent, two witnesses and 4 exhibits. Adjourned to November 11, 1929.

November 11, 1929.—Frank J. Coleman, J. Trial resumed. Libellants, 5 exhibits. Respondent, 5 witnesses and 8 exhibits. Adjourned to November 12, 1929.

November 12, 1929.—Frank J. Coleman, J. Trial resumed. Libellants, 3 exhibits. Respondent, 7 witnesses, 1 exhibit and 1 dep. Adjourned to November 13, 1929.

November 13, 1929.—Frank J. Coleman, J. Trial re-
[fol. 3] sumed. Libellants, 1 witness and 2 exhibits. Respondent. Decision reserved.

March 29, 1930—Filed stipulation providing for additional proof.

August 19, 1930—Filed opinion No. 6031. Decree for respondent. Coleman, J.

August 20, 1930.—Filed Vols. 1 and 2. Stenographer's minutes.

August 26, 1930—Filed bill of taxed costs.

October 1, 1930—Decree dismissing libel with costs as taxed at $748.05. Coleman, J.

December 24, 1930.—Filed notice and order allowing appeal.

December 24, 1930—Filed assignments of error.

December 24, 1930—Filed order extending time to file record on appeal to February 26, 1931, Woolsey, J.

December 29, 1930—Filed bond for costs on appeal.

February 26, 1931—Filed order extending term of court to March 30, 1931, etc., Bondy, J.

March 30, 1931—Filed order extending term of court to April 30, 1931, etc., Bondy, J.

April 28, 1931—Filed order extending term of court to June 1, 1931, Clerk.

May 29, 1931—Filed order extending term of court to July 1, 1931, Clerk.

[fol. 4] IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel and complaint of Earle & Stoddart, Inc., Earle, Stoddart & Clayton, Ltd., E. Capelcure & Co., Ltd., Strauss & Co., Ltd., Micks, Lambert & Co., John Doe Micks, Richard Roe Lambert, John Doe and Richard Roe, Co-partners, trading under the name and style of Micks, Lambert & Co., Sanday & Co., Inc., Henry Leetham & Sons, Limited, Sanday & Co., Limited, W. S. Williamson & Co., W. S. Williamson, John Doe and Richard Roe, Co-partners, trading under the name and style of W. S. Williamson & Co., Kingan & Company, Kingan & Co., Ltd., Schuckl & Company, Inc., Co-Operative Wholesale Society, Ltd., Pelling, Stanley & Co., Ltd., A. E. Staley Mfg. Co., H. Lionel Tydeman & Co., H. Lionel Tydeman, John Doe and Richard Roe, co-partners, trading under the name and style of H. Lionel Tydeman & Co., A. E. Chew, Stuebing Truck Company, W. P. Notcutt, Limited, R. E. Dietz Company, E. & F. Turnbull, Ltd., Certain-Teed Products Corporation, B. L. Roberts, F. E. Booth Co., Inc., United Sales Organizations, Ltd., The New Jersey Zinc Sales Co., Inc., Morris Ashby, Limited, Republican Mining & Metal Co., Ltd., The Cookson Lead & Antimony Co., Ltd., James Hewitt & Co., Ltd., United States Steel Products Company, Ruston & Hornsby, Limited, California Packing Corporation, R. & W. Davidson, Limited, J. V. Faber & Co., Ltd., Metcalfe's Stores, Ltd., Broughs, Ltd., Thomas Bell & Son, Ltd., Bueman & Riley Bros., Ltd., W. P. Tanner-Gross & Company, Inc., Watson & Philip, Ltd., Wilson D. Lyon, Loren M. Cowdrey [fol. 5] and A. Gordon Wilson, co-partners, trading under the name and style of Lyon, Cowdrey & Wilson, Angus Watson & Co., Ltd., Hawaiian Canneries Co., Ltd., The Haserot Company, Harry Hall & Co., Inc., Meredith Brothers & Co., Ltd., Simpson, Roberts & Co., Ltd., Acheson Graphite Company, Cromil Engineering Co., Ltd., T. M. Sinclair & Co., Ltd., W. P. Sinclair & Co. Ltd., Bemis Bros. Bag Company, Joseph Rank, Ltd., Griffith-Durney Company, Morris & Jones, Limited, Walker Canning Com-

pany, Armour & Company, Ltd., Pillsbury Flour Mills Company, Edward Rathbone & Son, Edward Rathbone, John Doe Rathbone, Richard Roe Rathbone, John Doe and Richart Roe, co-partners, trading under the name and style of Edward Rathbone & Sons, American Chain Company, Inc., Joh. Olafsson & Co., Joh. Olafsson, John Doe and Richard Roe, co-partners, trading under the name and style of Joh. Olafsson & Co., Tide Water Oil Company, Armour & Company, North American Provision Company, Morris & Co., Ltd., A. V. Berner & Company, Inc., James Arnott & Sons, Ltd. James B. Berry Sons Company, Inc., Consolidated Dairy Products Co., Roberts & Schaefer Company, Hugh Wood & Co., Ltd., Goodall Clayton & Co., Ltd., L. Sonneborn Sons, Inc., Waverly Oil Works Co., Jacob Dold Packing Company, The Leavit Machine Co., Caldwell & Company, Inc., Langstaff Erembert & Co., Ltd., The Barber Asphalt Company, Walter M. Field & Company, Walter M. Field, John Doe and Richard Roe, co-partners, trading under the name and style of Walter M. Field & Company, A. M. Landauer, B. Landauer, W. T. Hammond and D. J. Saunders, co-partners, trading under the name and style of Landauer & Company, Bay Side Canning Co., Starr [fol. 6] Fruit Products Company, Gabriel Nachman, Inc., Jebb Bros., Ltd., George F. Smith & Son, Limited, Strathmore Paper Company, California Co-Operative Canneries, M. B. Jones & Co., Inc., Cargo Superintendents, Ltd., Grain Union, Ltd., Reynolds, Stott & Haslegrave, Ltd., Keighley, Maxsted & Company, John Doe Keighley, Richard Roe Keighley, John Doe Maxsted, Richard Roe Maxsted, John Doe and Richard Roe, co-partners, trading under the name and style of Keighly, Maxsted & Company, Canadian Co-Operative Wheat Producers, Ltd., A. Zerega's Sons, Consolidated, Continental Produce Company, Ltd., Federated Metals Corporation, The Felling Zinc Oxide Co., Ltd., Yeskel Supply Co., Inc., Soeteman Freres, John Doe Soeteman, Richard Roe Soeteman, John Doe and Richard Roe, co-partners, trading under the name and style of Soeteman Freres, S. Henle, Inc., Bartoline (Hull), Ltd., Thomas-Body Company, Inc., Morris & Co. (Meat Importers), Ltd., Pitt & Scott, Inc., Bureau of American Mfgrs. in Europe, Ltd., Arthur I. Rackliff, H. J. Heinz Co., H. J. Heinz Company, Ltd., J. Stevens Arms Company, High

Rock Knitting Company, A. T. Singer, Wilson & Co., Inc., Wilson & Co., Inc., Melady Grain Co., Inc., Spear & Thorpe, John Doe Spear, Richard Roe Thorpe, John Doe and Richare Roe, co-partners, trading under the name and style of Spear & Thorpe, O. M. Earle Co., Inc., Humber Fruit Brokers, Ltd., E. I. du Pont de Nemours & Company, Inc., Kynoch, Ltd., Vickers, Ltd., Nobel Industries, Ltd., Anderson & Mishkin, Ltd., William S. Gray & Co., Herbert Smart & Co., Ltd., Barter Trading Co., Ltd., Henry Heide, Inc., British Merchants, Inc., Ltd., D. L. Sterling and Sons, [fol. 7] Inc., John Trauers & Son, Ltd., Bray Gibb & Co., Ltd., Robins Conveying Belt Co., Fraser & Chalmers Engineering Works, International Combustion, Ltd., Eugene Donzelot & Son, John Doe Donzelot, Richard Roe Donzelot, John Doe and Richard Roe, co-partners, trading under the name and style of Eugene Donzelot & Son, F. W. Berk & Co., Ltd., Haines Coote & Co., John Doe Haines, Richard Roe Coote, John Doe and Richard Roe, co-partners, trading under the name and style of Haines Coote & Co., and Henry W. Peabody & Co. against Ellerman's Wilson Line, Limited, owner and operator of the Steamship "Galileo", in a cause of contract and cargo damage, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. At all the times hereinafter mentioned your libellants were, and they now are, individuals, corporations or copartnerships as follows:

1. Earle & Stoddart, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 8 Bridge Street, Borough of Manhattan, City, State and Southern District of New York.

2 Earle, Stoddart & Clayton, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

3. E. Capel-Cure & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of [fol. 8] the United Kingdom of Great Britan and Ireland,

with an office and place of business in the City of Liverpool, England.

4. Strauss & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

5. Micks Lambert & Co., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Hull, England.

6. John Doe Micks, Richard Roe Lambert, John Doe and Richard Roe, copartners, trading under the firm name and style of Micks Lambert & Company, with an office and place of business in the City of Hull, England.

7. Sanday & Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at the Produce Exchange, Borough of Manhattan, City, State and Southern District of New York.

8. Henry Leetham & Sons, Limited, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in Yorkshire, England.

9. Sanday & Co., Limited, a corporation duly created, organized and existing under and by virtue of the laws of the [fol. 9] United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

10. W. S. Williamson & Co., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

11. W. S. Williamson, John Doe and Richard Roe, copartners, trading under the firm name and style of W. S. Williamson & Co., with an office and place of business in the City of London, England.

12. Kingan & Company, a corporation duly organized and existing under and by virtue of the laws of the State

of Indiana, with an office and place of business in the City of Indianapolis, Indiana.

13. Kingan & Co., Limited, a corporation, duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Belfast, Ireland.

14. Schuckl & Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business in the City of San Francisco, California.

15. Co-Operative Wholesale Society, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Manchester, England.

[fol. 10] 16. Pelling, Stanley & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Liverpool, England.

17. A. E. Staley Mfg. Co., a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with an office and place of business in the City of Decatur, Illinois.

18. H. Lionel Tydeman & Co., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

19. H. Lionel Tydeman, John Doe and Richard Roe, copartners, trading under the firm name and style of H. Lionel Tydeman & Co., with an office and place of business in the City of London, England.

20. A. E. Chew, a resident of New York, with an office and place of business at 17 Battery Place, Borough of Manhattan, City, State and Southern District of New York.

21. Stuebing Truck Company, a corporation duly organized and existing under the laws of the State of Ohio, with an office and place of business in the City of Cincinnati, Ohio.

22. W. P. Notcutt, Limited, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

[fol. 11] 23. R. E. Dietz Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 60 Laight Street, Borough of Manhattan, City, State and Southern District of New York.

24. E. & F. Turnbull, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

25. Certain-Teed Products Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, with an office and place of business at 100 East 42nd Street, Borough of Manhattan, City, State and Southern District of New York.

26. B. L. Roberts, a resident of Newcastle, England, with an office and place of business in the City of Newcastle, England.

27. F. E. Booth Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business at 19 Hudson Street, Borough of Manhattan, City, State and Southern District of New York.

28. United Sales Organizations, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office in the City of London, England.

[fol. 12] 29. The New Jersey Zinc Sales Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with an office and place of business at 160 Front Street, Borough of Manhattan, City, State and Southern District of New York.

30. Morris Ashby, Limited, a corporation duly created, organized and existing under and by virtue of the laws of

the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

31. Republican Mining & Metal Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

32. The Cookson Lead & Antimony Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

33. James Hewitt & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

34. United States Steel Products Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with an office and place of [fol. 13] business at 30 Church Street, Borough of Manhattan, City, State and Southern District of New York.

35. Ruston & Hornsby, Limited, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office in the City of Lincoln, England.

36. California Packing Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business at 90 Broadway, Borough of Manhattan, City, State and Southern District of New York.

37. R. & W. Davidson, Limited, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Glasgow, Scotland.

38. J. V. Faber & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an

office and place of business in the City of Newcastle, England.

39. Metcalfe's Stores, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

40. Broughs, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United [fol. 14] Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

41. Thomas Bell & Son, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

42. Buemann & Riley Bros., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

43. W. P. Tanner-Gross & Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 25 Beaver Street, Borough of Manhattan, City, State and Southern District of New York.

44. Watson & Philip, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Dundee, Scotland.

45. Wilson D. Lyon, Loren M. Cowdrey and A. Gordon Wilson, copartners, trading under the firm name and style of Lyon, Cowdrey & Wilson, with an office and place of business at 17 Battery Place, Borough of Manhattan, City, State and Southern District of New York.

[fol. 15] 46. Angus Watson & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and

Ireland, with an office and place of business in the City of Newcastle, England.

47. Hawaiian Canneries Co., Ltd., a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii with an office and place of business in the City of Ahukini, T. H.

48. The Haserot Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, with an office and place of business in the City of Cleveland, Ohio.

49. Harry Hall & Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business in the City of San Francisco, California.

50. Meredith Brothers & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Liverpool, England.

51. Simpson, Roberts & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Liverpool, England.

[fol. 16] 52. Acheson Graphite Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 33 West 42nd Street, Borough of Manhattan, City, State and Southern District of New York.

53. Cromil Engineering Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

54. T. M. Sinclair & Co., Ltd., a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, with an office and place of business in the City of Cedar Rapids, Iowa.

55. W. P. Sinclair & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Liverpool, England.

56. Bemis Bros. Bag Company, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business at 2nd Avenue and 51st Street, Borough of Brooklyn, City, State and Eastern District of New York.

57. Joseph Rank, Ltd., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and [fol. 17] place of business in the City of Hull, England.

58. Griffith-Durhey Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business in the City of San Francisco, California.

59. Morris & Jones, Limited, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Liverpool, England.

60. Walker Canning Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with an office and place of business in the City of Independence, Oregon.

61. Armour & Company, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

62. Pillsbury Flour Mills Company, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, with an office and place of business in the Produce Exchange, Borough of Manhattan, City, State and Southern District of New York.

63. Edward Rathbone & Son, a corporation duly created, organized and existing under and by virtue of the laws of [fol. 18] the United Kingdom of Great Britain and Ireland,

with an office and place of business in the City of London, England.

64. Edward Rathbone, John Doe Rathbone, Richard Roe Rathbone, John Doe and Richard Roe, co-partners, trading under the firm name and style of Edward Rathbone & Son, with an office and place of business in the City of London, England.

65. American Chain Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, with an office and place of business in the City of Bridgeport, Connecticut.

66. Joh. Olafsson & Co., a corporation duly created, organized and existing under and by virtue of the laws of the Kingdom of Denmark, with an office and place of business in the City of Reykjavik, Iceland.

67. Joh. Olafsson, John Doe and Richard Roe, co-partners, trading under the firm name and style of Joh. Olafsson & Co., with an office and place of business in the City of Reykjavik, Iceland.

68. Tidewater Oil Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with an office and place of business at 11 Broadway, Borough of Manhattan, City, State and Southern District of New York.

69. Armour & Company, a corporation duly organized and existing under and by virtue of the laws of the State of [fol. 19] Illinois, with an office and place of business at 120 Broadway, Borough of Manhattan, City, State and Southern District of New York.

70. North American Provision Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with an office and place of business at 120 Broadway, Borough of Manhattan, City, State and Southern District of New York.

71. Morris & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Liverpool, England.

72. A. V. Berner & Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 15 Whitehall Street, Borough of Manhattan, City, State and Southern District of New York.

73. James Arnott & Sons, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

74. James B. Berry Sons Company, Inc., a corporation duly organized and existing under and by virtue of the laws [fol. 20] of the State of Pennsylvania, with an office and place of business in Oil City, Pennsylvania.

75. Consolidated Dairy Products Co., a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with an office and place of business in the City of Seattle, Washington.

76. Roberts & Schaefer Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with an office and place of business in the City of Chicago, Illinois.

77. Hugh Wood & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

78. Goodall Clayton & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

79. L. Sonneborn Sons, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business at 114 Fifth Avenue, Borough of Manhattan, City, State and Southern District of New York.

80. Waverly Oil Works Co., a corporation duly organized and existing under and by virtue of the laws of the

[fol. 21] State of Pennsylvania, with an office and place of business at 30 Church Street, Borough of Manhattan, City, State and Southern District of New York.

81. Jacob Dold Packing Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 433 West 14th Street, Borough of Manhattan, City, State and Southern District of New York.

82. The Leavitt Machine Co., a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, with an office and place of business in the City of Orange, Massachusetts.

83. Caldwell & Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 50 Broad Street, Borough of Manhattan, City, State and Southern District of New York.

84. Langstaff Erembert & Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Liverpool, England.

85. The Barber Asphalt Company, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, with an office and place of business at 233 Broadway, Borough of Manhattan, City, State and Southern District of New York.

[fol. 22] 86. Walter M. Field & Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business in the City of San Francisco, California.

87. Walter M. Field, John Doe and Richard Roe, co-partners, trading under the firm name and style of Walter M. Field & Company, with an office and place of business in the City of San Francisco, California.

88. A. M. Landauer, B. Landauer, W. T. Hammond and D. J. Saunders, co-partners, trading under the firm name and style of Landauer & Company, with an office and place of business in the City of London, England.

89. Bay Side Canning Co., a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business in the City of Alviso, California.

90. Starr Fruit Products Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with an office and place of business in the City of Portland, Oregon.

91. Gabriel Nachman, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 209 Sullivan Street, Borough of Manhattan, City, State and Southern District of New York.

[fol. 23] 92. Jebb Bros. Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

93. George F. Smith & Son, Limited, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Hull, England.

94. Strathmore Paper Company, a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, with an office and place of business in the City of Woronoco, Massachusetts.

95. California Co-Operative Canneries, a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business in the City of San Francisco, California.

96. M. B. Jones & Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 2 Broadway, Borough of Manhattan, City, State and Southern District of New York.

97. Cargo Superintendents Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland

with an office and place of business in the City of Hull, England.

[fol. 24] 98. Grain Union Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

99. Reynolds, Stott & Haslegrave, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Wakefield, England.

100. Keighley, Maxsted & Company, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Hull, England.

101. John Doe Keighley, Richard Roe Keighley, John Doe Maxsted, Richard Roe Maxsted, John Doe and Richard Roe, copartners, trading under the firm name and style of Keighley, Maxsted & Company, with an office and place of business in the City of Hull, England.

102. Canadian Co-Operative Wheat Producers, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the Dominion of Canada, with an office and place of business in the City of Winnipeg, Canada.

103. A. Zerega's Sons, Consolidated, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business [fol. 25] at 28 Front Street, Borough of Manhattan, City, State and Southern District of New York.

104. Continental Produce Company, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

105. Federated Metals Corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business at 233 Broadway, Borough of Manhattan, City, State and Southern District of New York.

106. The Felling Zinc Oxide Co., Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business at Felling-on-Tyne, England.

107. Yeskel Supply Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 29 Broadway, Borough of Manhattan, City, State and Southern District of New York.

108. Soeteman Freres, a corporation duly created, organized and existing under and by virtue of the laws of the Kingdom of Belgium, with an office and place of business in the City of Antwerp, Belgium.

109. John Doe Soeteman, Richard Roe Soeteman, John Doe and Richard Roe, co-partners, trading under the firm [fol. 26] name and style of Soeteman Freres, with an office and place of business in the City of Antwerp, Belgium.

110. S. Henle, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 8 Bridge Street, Borough of Manhattan, City, State and Southern District of New York.

111. Bartoline (Hull) Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Hull, England.

112. Thomas-Body Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, with an office and place of business in the City of Oakland, California.

113. Morris & Co. (Meat Importers) Ltd., a corporation duly created, organized and existing under and by virtue of

the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Newcastle, England.

114. Pitt & Scott, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 55 Front Street, Borough of Manhattan, City, State and Southern District of New York.

[fol. 27] 115. Bureau of American Mfgrs. in Europe, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

116. Arthur I. Rackliff, a resident of the State of Maine, with an office and place of business in the City of Farmington, Maine.

117. H. J. Heinz Co., a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, with an office and place of business in the City of Pittsburgh, Pennsylvania.

118. H. J. Heinz Company, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

119. J. Stevens Arms Company, a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, with an office and place of business at 100 East 42nd Street, Borough of Manhattan, City, State and Southern District of New York.

120. High Rock Knitting Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 93 Worth Street, Borough of Manhattan, City, State and Southern District of New York.

[fol. 28] 121. A. T. Singer, a resident of Newcastle, England, with an office and place of business in the City of Newcastle, England.

122. Wilson & Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, with an office and place of business in Kansas City, Kansas.

123. Wilson & Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with an office and place of business in the City of Chicago, Illinois.

124. Melady Grain Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business in the Produce Exchange, Borough of Manhattan, City, State and Southern District of New York.

125. Spear & Thorpe, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Hull, England.

126. John Doe Spear, Richard Roe Thorpe, John Doe and Richard Roe, copartners, trading under the firm name and style of Spear & Thorpe, with an office and place of business in the City of Hull, England.

127. O. M. Earle Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at 207 Duane Street, Borough of Manhattan, City, State and [fol. 29] Southern District of New York.

128. Humber Fruit Brokers, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of Hull, England.

129. E. I. du Pont de Nemours & Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business at 17 Battery Place, Borough of Manhattan, City, State and Southern District of New York.

130. Kynoch, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United

Kingdom of Great Britain and Ireland, with an office and place of business in the City of Birmingham, England.

131. Vickers, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

132. Nobel Industries, Ltd., a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the City of London, England.

133. Anderson & Mishkin, Ltd., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an [fol. 30] office and place of business in the Colman Building, City of Seattle, Washington.

134. William S. Gary & Co., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 342 Madison Avenue, Borough of Manhattan, City, State and Southern District of New York.

135. Herbert Smart & Co., Ltd., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business at Lloyd's House, 6 Lloyd's Avenue, London, England.

136. Barter Trading Co., Ltd., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the Imperial House, 17 Kingsway, London, England.

137. Henry Heide, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 313 Hudson Street, Borough of Manhattan, City, State and Southern District of New York.

138. British Merchants, Inc., Ltd., a corporation duly organized and existing under and by virtue of the laws of

the United Kingdom of Great Britain and Ireland, with an [fol. 31] office and place of business at 37 Eastcheap, London, England.

139. D. L. Sterling & Sons, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 100 Hudson Street, Borough of Manhattan, City, State and Southern District of New York.

140. John Trauers & Sons, Ltd., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business at No. 119 Cannon Street, London, England.

141. Bray Gibb & Co., Ltd., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business at No. 14 Sherborne Lane, London, England.

142. Robins Conveying Belt Co., a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with an office and place of business at No. 15 Park Row, Borough of Manhattan, City, State and Southern District of New York.

143. Fraser & Chalmers Engineering Works, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in Newcastle, England.

144. International Combustion, Ltd., a corporation duly [fol. 32] organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business in the Africa House, Kingsway, London, England.

145. Eugene Donzelot & Son, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business at No. 16 South First Street, St. Louis, Missouri.

146. John Doe Donzelot, Richard Roe Donzelot, John Doe and Richard Roe, copartners, trading under the name and

style of Eugene Donzelot & Son, with an office and place of business at No. 16 South First Street, St. Louis, Missouri.

147. F. W. Berk & Co., Ltd., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business at No. 106 Fenchurch Street, London, England.

148. Haines Coote & Co., a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, with an office and place of business at No. 155 Fenchurch Street, London, England.

149. John Doe Haines, Richard Roe Coote, John Doe and Richard Roe, copartners, trading under the firm name and style of Haines Coote & Co., with an office and place of business at No. 155 Fenchurch Street, London, England.

150. Frederick N. Lincoln, John R. Bradlee, Charles E. [fol. 33] Barry, Frederick N. Lincoln, Jr., and Brantz M. Bryan, copartners trading under the firm name and style of Henry W. Peabody & Co., with an office and place of business at No. 17 State Street, Borough of Manhattan, City, State and Southern District of New York.

Second. At all the times hereinafter mentioned, the respondent was, and now is, a corporation duly created, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, owning and operating a number of steam vessels, including those hereinafter mentioned, engaged in the common carriage of cargo on the high seas, having an office and principal place of business in the City of Hull, England; and, at all the times hereinafter mentioned, it was the owner and operator of the steamship "Galileo" which, at all the times hereinafter mentioned, was a general ship engaged in the common carriage of merchandise for hire between, among others, the port of New York and the ports of Hull, Newcastle and Antwerp.

Third. During the month of August, 1926, certain consignments of merchandise set out in the list annexed hereunto, marked Exhibit "S", all in good order and condition, were shipped and placed on board the Steamship

"Galileo" at the port of New York to be carried on the said vessel by the respondent, as a common carrier, to the ports of Hull and/or Newcastle and/or Antwerp and/or to be there transshipped to the destinations designated in the respective bills of lading and to be delivered at said destinations in like good order and condition as when shipped, unto the order of the respective consignees; and [fol. 34] the said respondent then and there agreed to carry the said merchandise on the said vessel to the ports of Hull and/or Newcastle and/or Antwerp and to deliver the said merchandise, in like good order and condition as when shipped, in consideration of certain agreed freight and in accordance with the valid terms of certain bills of lading covering the said shipments, signed and delivered to the respective shippers by the duly authorized agents of the respondent during the months of July and August, 1926. Each of the said bills of lading, with the exception of certain special provisions, viz., date, name of shipper, name of consignee, destination of the merchandise shipped, description of the merchandise shipped, identification marks of the merchandise, notations in reference to freight, and special stamped conditions, was in one of the forms hereto attached as exhibits, viz., bills of lading "A" to "R", inclusive. Photostatic copies of said exhibits, bills of lading "A" to "R", inclusive, are annexed hereto and are hereby made a part of this libel as fully as if they had been set forth at length herein.

Fourth. The forms of the bills of lading, the names of the shippers, the dates, places and/or ports of shipments, the ports and/or places of destination, the merchandise shipped, and the consignees named in the bills of lading were as shown on the list annexed hereunto, made a part hereof and marked Exhibit "S".

Fifth. Thereafter the steamship "Galileo", laden with the cargo aforesaid, sailed from the port of New York, bound for the ports of Hull and/or Newcastle and/or Ant- [fol. 35] werp, but the steamship "Galileo" has failed to deliver the said cargo at said ports of destination, in accordance with the contracts of carriage aforesaid. The steamship "Galileo" delivered a small portion of said merchandise at the port of New York, but not in like good order and condition as when shipped. The merchandise

so delivered was short and seriously damaged. The greater portion of the merchandise described in the Fourth Article of this libel has never been delivered, either at the designated ports of destination or at any other place, and your libellants allege, upon information and belief, that the said merchandise has either become totally lost or has been sold by the respondent and the proceeds retained by it.

Sixth. Prior to the delivery of any of the said merchandise and prior to the commencement of this action, your libellants were and/or became, for value, the owners and holders of the respective bills of lading covering the said merchandise described in Exhibit "S" of this libel, and entitled to the delivery thereof, in accordance with the provisions of the said bills of lading.

Seventh. By reason of the premises, your libellants have sustained damages in the sum of Seven hundred thousand Dollars ($700,000.00), as nearly as the same can now be estimated, no part of which has been paid, although the same has been duly demanded.

Eighth. Your libellants have duly performed all conditions precedent to suit on their part to be performed under the said bills of lading and under the maritime law. The [fol. 36] time within which the libellants might commence suit for non-delivery or damage to the goods covered by said bills of lading was extended by agreement executed by the respondent.

Ninth. All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court.

Wherefore libellants pray that process in due form of law, according to the course and practice of this Honorable Court in causes of Admiralty and Maritime Jurisdiction, may issue against the respondent above named, Ellerman's Wilson Line, Limited, and that the said respondent be cited to appear and answer, on oath, this libel and all and singular the matters aforesaid; and that in the event that the said respondent cannot be found in this District then that the steamships "Francisco", "Gourko", "Guido", "Idaho", "Kyno", "Lepanto" and "Marengo" and moneys, freights, etc., goods, credits and effects due

to said respondent from Ellerman's Wilson Line, New York, Inc., 26 Broadway, Borough of Manhattan, City, State and Southern District of New York, and any other property belonging to the said respondent be attached for the amount set forth; and that this Honorable Court be pleased to decree to your libellants their damages against the said respondent, with interest and costs, and that the said steamships "Francisco", "Gourko", "Guido", "Idaho", "Kyno", "Lepanto" and "Marengo", their engines, boilers, etc., and said other property so attached be condemned and sold to satisfy the same; and that your [fol. 37] libellants may have such other and further relief as in law and justice they may be entitled to receive.

Bigham, Englar & Jones, Proctors for Libellants.
Office & P. O. address: No. 64 Wall Street, Borough of Manhattan, City of New York.

INTERROGATORIES ANNEXED TO THE LIBEL TO BE ANSWERED BY THE RESPONDENT

First Interrogatory. What was the cause of the fire which broke out on the "Galileo"?

Second Interrogatory. (a) Did the fire break out in the bunker coal stowed in No. 3 tween-deck between a temporary wooden bulkhead and the forward fireroom bulkhead?

(b) If not where did the fire break out, and if what substance?

Third Interrogatory. (a) When was each lot of bunker coal in No. 3 tween-deck put on board the "Galileo"?

(b) What are the names and addresses of the persons who supplied and loaded that coal and how much did each supply?

[fol. 38] (c) What kinds of coal were in No. 3 tween-deck and what are their technical and trade designations or classifications?

(d) Where did that coal come from?

(e) Where was each such lot of coal loaded on the "Galileo"?

(f) How was each lot of coal stowed with relation to the other lots of coal in No. 3 tween-deck?

(g) How old was each such lot of coal?

(h) In what enclosures, containers or holds had it been confined after its receipt on board the "Galileo" and for what period of time?

(i) What was the condition of the temporary wooden bulkhead in No. 3 tween-deck as to being watertight?

(j) What kinds and quantities of cargo were stowed in No. 3 tween-deck forward of the temporary wooden bulkhead?

(k) Was lard or other similar substance stowed forward of the temporary wooden bulkhead?

Fourth Interrogatory. (a) What was the extent of the fire on the "Galileo"?

(b) Exactly what parts of the "Galileo" were burned by the fire and to what extent?

(c) What was the nature and extent of the physical dam- [fol. 39] age to her hull structure which the "Galileo" sustained as a direct result of contact with the fire?

Fifth Interrogatory. Where was the "Galileo" when the fire broke out?

Sixth Interrogatory. Produce a copy of the entries in the scrap or rough deck and engine room logbooks of the "Galileo" covering the period of the fire and the examinations and surveys afterwards made to ascertain its cause and extent.

Seventh Interrogatory. What persons first observed the fire and what did they see?

Eighth Interrogatory. What persons were present when the fire broke out?

Ninth Interrogatory. How long did the fire continue?

Tenth Interrogatory. Did officers and men of the New York City Fire Department offer their services in helping to extinguish the fire at about 3 A. M. on August 29th, 1926?

Eleventh Interrogatory. Was the offer of assistance by the New York City Fire Department accepted or refused?

Twelfth Interrogatory. Why was that offer of assistance by the New York City Fire Department refused?

[fol. 40] Thirteenth Interrogatory. (a) Was a Fire Vessel of the Fire Department available at 3 A. M. on August 29, 1926, to assist in extinguishing the fire?

(b) Did those in charge of such fire vessel offer to assist in extinguishing the fire?

(c) Was such offer accepted or refused?

(d) Why was such offer refused?

Fourteenth Interrogatory. (a) Why was no assistance of the Fire Department asked or accepted between 3 A. M. on August 29, 1926, and 6:40 P. M. on August 26, 1927?

(b) Did any shore agent or shore representative of the "Galileo" give any advice or instructions to those on board the "Galileo" in respect to the Fire Department or to the method by which the fire should be extinguished?

Fifteenth Interrogatory. (a) Describe in detail all the communications, either oral or written, which passed between the master or those on the "Galileo" and the owners or shore officers, agents or employees of the "Galileo" after the fire broke out and before it was finally extinguished.

[fol. 41] (b) What was the time when each such communication was made?

(c) Annex to your answer copies of all such communications as were in writing.

(d) What were the names and positions of the persons between whom such communications passed?

Sixteenth Interrogatory. (a) After the fire broke out and before it was extinguished, what communications passed between those on the "Galileo" and any other persons?

(b) Annex copies of all such communications which were in writing.

Seventeenth Interrogatory. (a) What efforts were made to extinguish the fire?

(b) Did any shore agent, representative or employee of the owner of the "Galileo" issue any advice or instructions with reference to extinguishing the fire?

Eighteenth Interrogatory. (a) Was any coal or cargo shifted or moved on the "Galileo" after the fire broke out and before it was finally extinguished; and if so,

(b) What quantities and from what place to what place?

[fol. 42] Nineteenth Interrogatory. (a) After the fire was extinguished was any coal or cargo shifted or moved in or from No. 3 tween-deck, and if so,

(b) Why?

(c) What was then observed?

Twentieth Interrogatory. Why was the damage to the "Galileo" and her cargo not limited and confined to the direct physical damage to her hull, bunker coal and cargo by burning?

Twenty-first Interrogatory. Produce and annex to your answer copies of the protest extended by the master of the "Galileo".

Twenty-second Interrogatory. Produce and annex to your answer copies of all reports regarding the fire on the "Galileo" and the damage to cargo, made to the owners and shore agents of the "Galileo" by her master and officers and by the surveyors employed by the owners and by the owners' underwriters.

Bigham, Englar & Jones, Proctors for Libellant, 64 Wall Street, Borough of Manhattan, City of New York.

[fols. 43 & 44] *Duly sworn to by Gerald F. Earle and T. Catesby Jones. Jurats omitted in printing.*

A Bill of Lading A

CO., INC.

ON BOARD 3/16

ing at the Port of NEW YORK and bound for HULL via Antwerp (with liberty to omit) and
, enter or stay at any other ports or places for any purposes whatsoever, although pertaining to
or offener, backwards or forwards in or out of any order or rotation, and the same to be
before or after sailing or arrival to put the vessel in dry dock for any purpose whatsoever,
liberty to carry goods of all kinds, dangerous or otherwise, and to carry livestock and/or cargo

~~steamer or steamers although prior or subsequent~~

430000 LBS

value unknown, and to be delivered in like good order and condition at the Port of HULL

or to his or their assigns, he or they

credit or discount, at the rate of

feet, as per margin

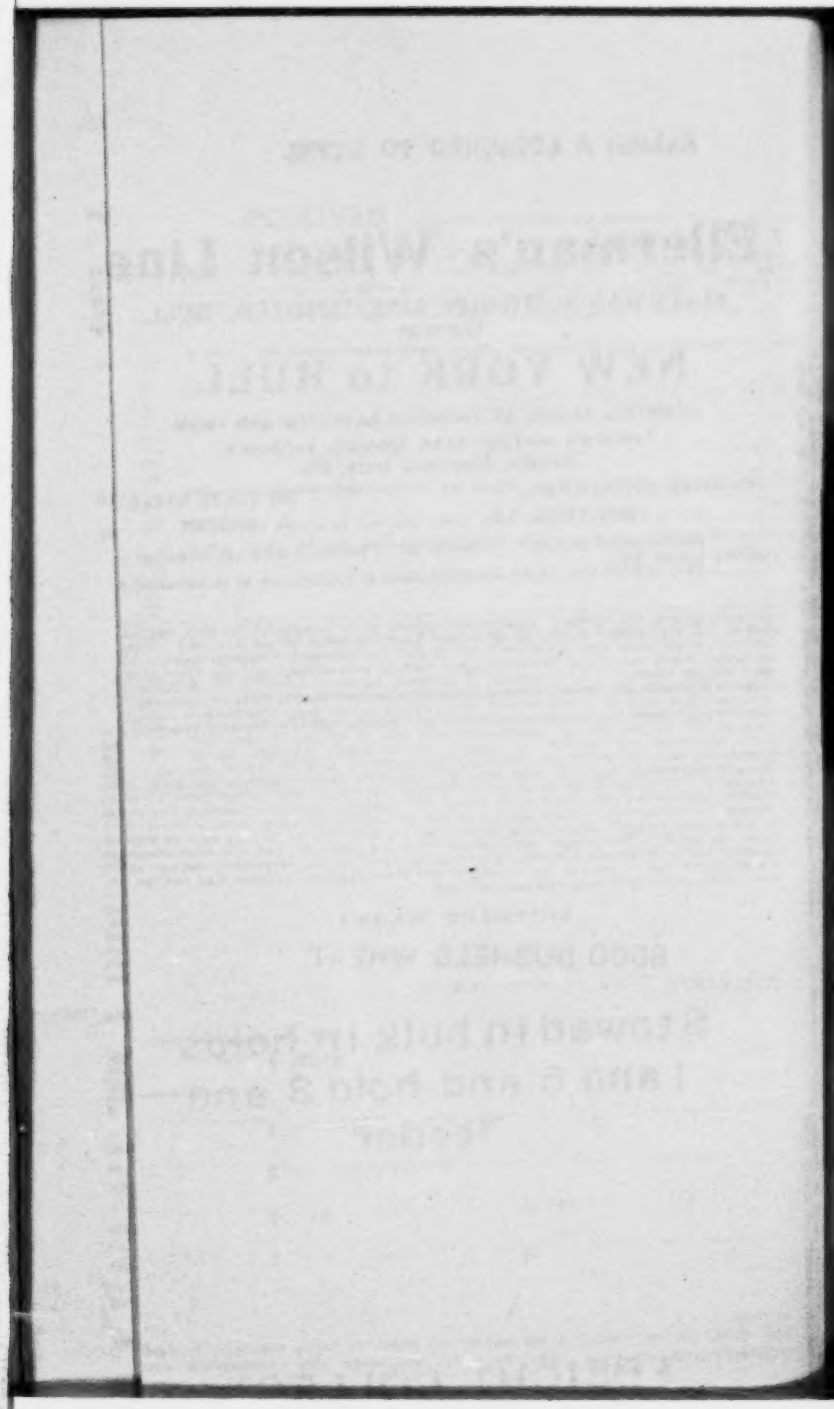
240 lbs., gross weight delivered.

480 lbs., gross weight delivered.

// //

law and usual vessels in distress, that the carrier shall have liberty to convey goods to
steamer shall put into a port of refuge, or be prevented from any cause from proceeding
that the carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay
ment, discharge, delivery or other disposition of goods, or on board, or in lighters or craft,
throughout this contract always excepted: By perils of the sea or other waters, by dan

FOLD OUT IS TOO LARGE TO BE FILMED



[fol. 45] EXHIBIT A ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 26, 1926

(Photoprint, side folio 45-a)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 46] EXHIBIT B ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 21, 1926

(Photoprint, side folio 46-a)

FOLD OUT IS TOO LARGE TO BE FILMED

4. Shippers shall be liable for any loss or damage to vessel or cargo, caused by inflammable, ex[illegible] ped thereunder.
shipper be principal or agent; and such goods so shipped may be thrown overboard or destroyed at any time without compensation. thout full disclosure of their nature, whether
5. The carrier shall have a lien on the goods for all freights and charges and any sums that may be due under this bill of lading, and also for all fines or damages which the vessel
go may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or addressing of packages or description of their contents.
6. If the vessel is prevented from reaching her destination by Quarantine, the carrier may discharge the goods into any depot or lazaretto, under suitable available protection,
tching notice thereof to the consignee, if named herein (at destination named), and otherwise to the shipper, and such discharge shall be deemed a final delivery under this con-
, and all the expenses thereby incurred on the goods shall be a lien thereon.
7. The vessel may commence discharging immediately on arrival and discharge continuously, any custom of the port to the contrary notwithstanding, the Collector of the Port
her proper officer being hereby authorised to grant a general order for discharge immediately on arrival, and if the goods be not taken from the vessel by the consignee directly
come to hand in discharging the vessel, the master or vessel's agent to be at liberty to enter and land thegoods, or put them into craft or store at the owner's risk and expense,
tching notice thereof to the consignee, if named herein (at destination named), and otherwise to the shipper, when the goods shall be deemed delivered and vessel's responsibility
d, but the vessel and carrier to have a lien on such goods until the payment of all costs and charges so incurred.
8. If on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the ocean carrier shall be entitled to recover the difference
the shipper, owner, or consignee. Full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water
ing the voyage. Freight prepaid will not be returned provided the goods have been loaded on the vessel.
9. In the event of claims for short delivery when the vessel reaches her destination, the value shall be adjusted as per conditions under clause 2, less all charges saved, vessel being
onsible only for such part of the goods as has been actually delivered to the vessel at the port (A) above mentioned, and vessel not liable for any loss, or damage that may have
rred before such delivery, while agreeing to present promptly to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred
re delivery of the goods at the port (A) above mentioned.
10. Goods on wharf awaiting shipment or delivery shall not be at ocean carrier's risk of loss or damage and [illegible]

32

[f

47] EXHIBIT C ANNEXED TO LIBEL

Bill of Lading, Dated July 17, 1926

Front & Back

(Photoprint, side folios 47-a and 47-b)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 48] EXHIBIT D ANNEXED TO LIBEL

Bill of Lading, Dated September 7, 1926

(Photoprint, side folio 48-a)

FOLD OUT IS TOO LARGE TO BE FILMED

Exhibit D. ATTACHED TO LIBEL

AMERICAN-HAWAIIA

Through to ... NEWCASTLE ... ...

... In case of the Blockade or intended of the port of destination, or if, without such Blockade or intention, the entering of the Port of Discharge should be considered unsafe by reason of War or Hostilities, the Master to have the option of landing the Goods at any other Port which he may consider safe at Shipper's risk and expense; and on the Goods being thereby so landed and a letter being put into the Post Office addressed to the Shipper, and if possible, the Consignee, if known, stating the landing and where deposited, the same to be at the Shipper's risk and expense, and the Company to be discharged from all responsibility.

GENERAL EUROPEAN AGENTS—
BENJN. ACKERLEY & SON.
LIVERPOOL.

P S CO 321 NEWCASTLE	50 Cases Canned Peaches
P S CO 405 NEWCASTLE	100 Cases Canned Peaches

FREIGHT PREPAID STPAPPED

ISSUED IN EXCHANGE FOR B/LADING NO.F.5.
NEWCASTLE - SS ARIZONAN V.16 - DATED
SAN FRANCISCO, 21ST JULY, 1926.
CONSIGNED TO ORDER OF SCHUCKLS CO.INC.
and duly endorsed, and surrendered by
Pelling Stanley & Co.Ltd.

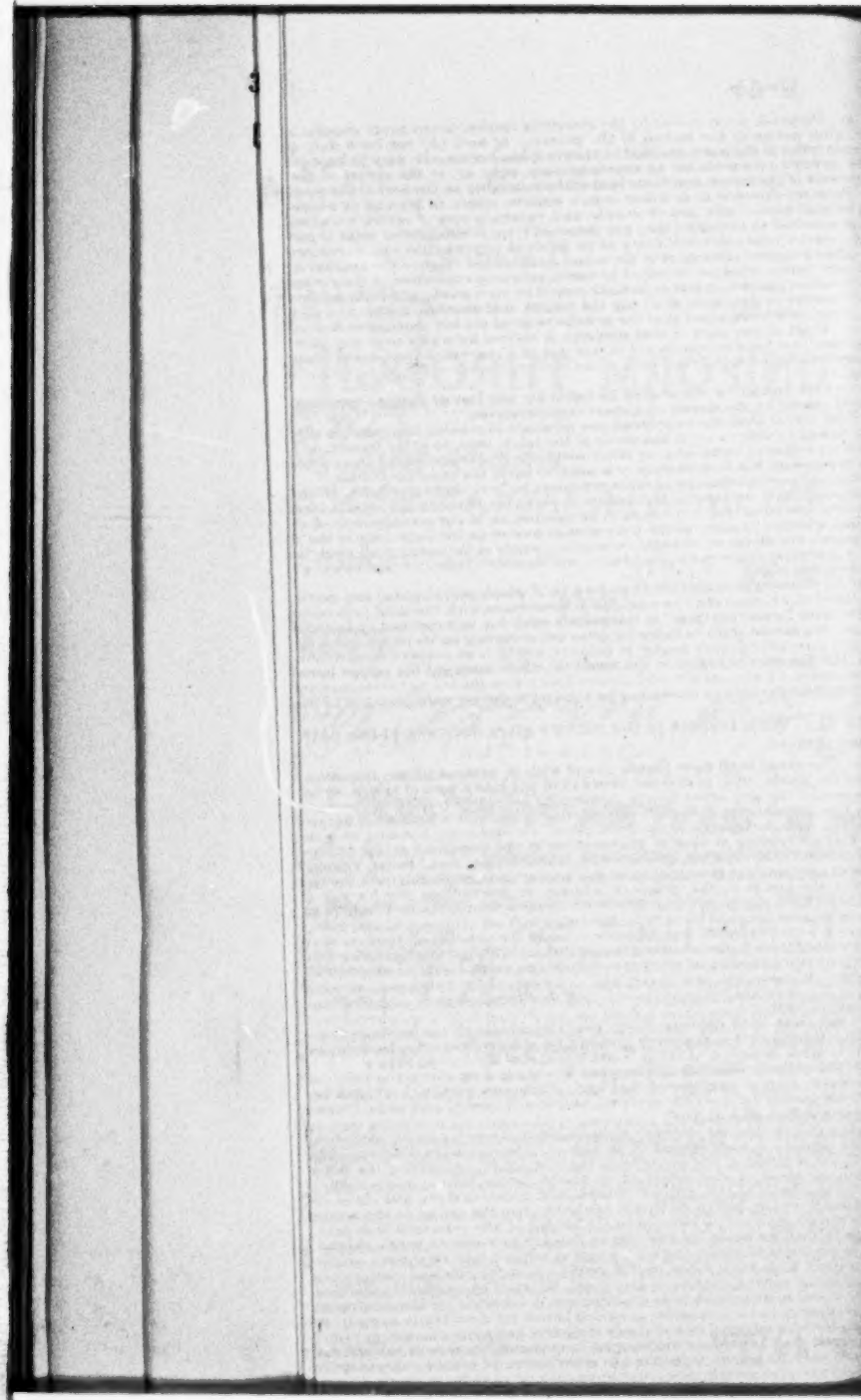


EXHIBIT E ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 16, 1926

Front & Back

(Photoprints, side folios 49-a and 49-b)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 50] EXHIBIT F ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 29, 1926

(Photoprint, side folio 50-a)

FOLD OUT IS TOO LARGE TO BE FILMED

F Bill of Lading F

DIETZ COMPANY

now lying at the Port of NEW YORK and bound for NEWCASTLE via Antw. ,(with
to or toward, call, enter or stay at any other ports or places for any purposes whatsoever, al
to destination, once or oftener, backwards or forwards in or out of any order or rotation, a
any time and place before or after sailing or arrival to put the vessel in dry dock for any
deviation; and with liberty to carry goods of all kinds, dangerous or otherwise, and to carry liv
port by any other steamer or steamers although prior or subsequent

GROSS WEIGHT 360 #

F

and value unknown), and to be delivered in like good order and condition at the Por
URNBULL , L.T .

allowance of credit or discount, at the rate of or to his or their a

per 40 cubic feet, as per margin.

per ton of 2240 lbs., gross weight delivered.

per lbs., gross weight delivered.

without pilots; to tow and assist vessels in distress; that the carrier shall have liberty to
and, in case the steamer shall put into a port of refuge, or be prevented from any cause
any other steamer; that the

EXHIBIT G ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 6, 1926

Front & Back

(Photoprints, 51-a and 51-b)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 52] EXHIBIT H ANNEXED TO LIBEL

Bill of Lading, Dated June 17, 1926

Front & Back

(Photoprints, 52-a and 52-b)

FOLD OUT IS TOO LARGE TO BE FILMED

H

H. 710

AGENTS:
Castle & Cooke, Ltd.
Honolulu, T. H.
Alexander & Baldwin, Ltd.
Seattle, Wn.
Kahului, T. H.
Port Allen, T. H.
C. [illegible]er & Co., Ltd.
Hilo, T. H.
Matson Navigation Co.
Los Angeles, Cal.

M tson Na

SAN FRANCISCO—SEA
CALL—COLUMBIA

Honolulu Agents
Castle & Cooke, Ltd.

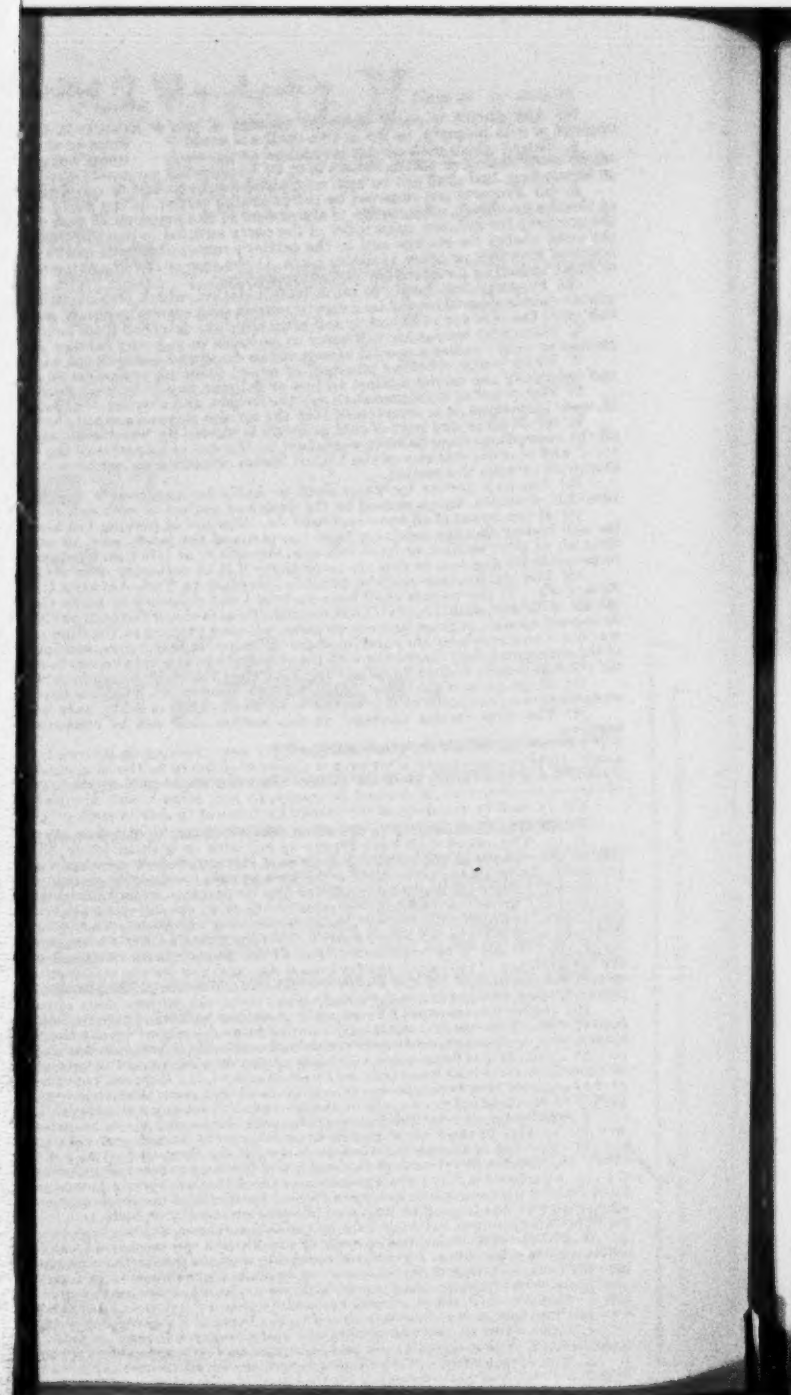
RECEIVED at the port, as dated below, by Matson Navigation Co., he
port on STEAMER named below, or on such other steamer or steamers
and good order, except when otherwise noted—the value, weight, quantity
Carrier—the agent to be so forwarded with such reasonable dispatch as ge
thereto as said navigation of such vessel or vessels shall then permit, and
signee, or if said consignee be not on hand to so receive same or if said
or wharfinger or to any forwarder or other carrier for and instead of said
by Carrier and average shall be due and payable on any such delivery, and
and to secure payment of such charges said packages are hereby pledged to
after it is unloaded from vessel's tackles. Carrier shall have all rights a
and 2196, Civil Code of California, together with the benefit of all laws of

STEAMER: SS "MAKENA" VOY. #29

SHIPPER: HAWAIIAN CANNERIES CO.,LTD.,

CONSIGNED TO: THE HASEROT COMPANY,

MARKS	PKGS.	Kind of Pkg.
196	125 cs.	#2½ C
A.W.		
NEW CASTLE-ON-TYNE		
	CONSIGNED TO:	
	ORDER NOTIFY:	
	For transhipme	



[fol. 53] EXHIBIT I ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 20, 1926

Front & Back

(Photoprints, 53-a and 53-b)

FOLD OUT IS TOO LARGE TO BE FILMED

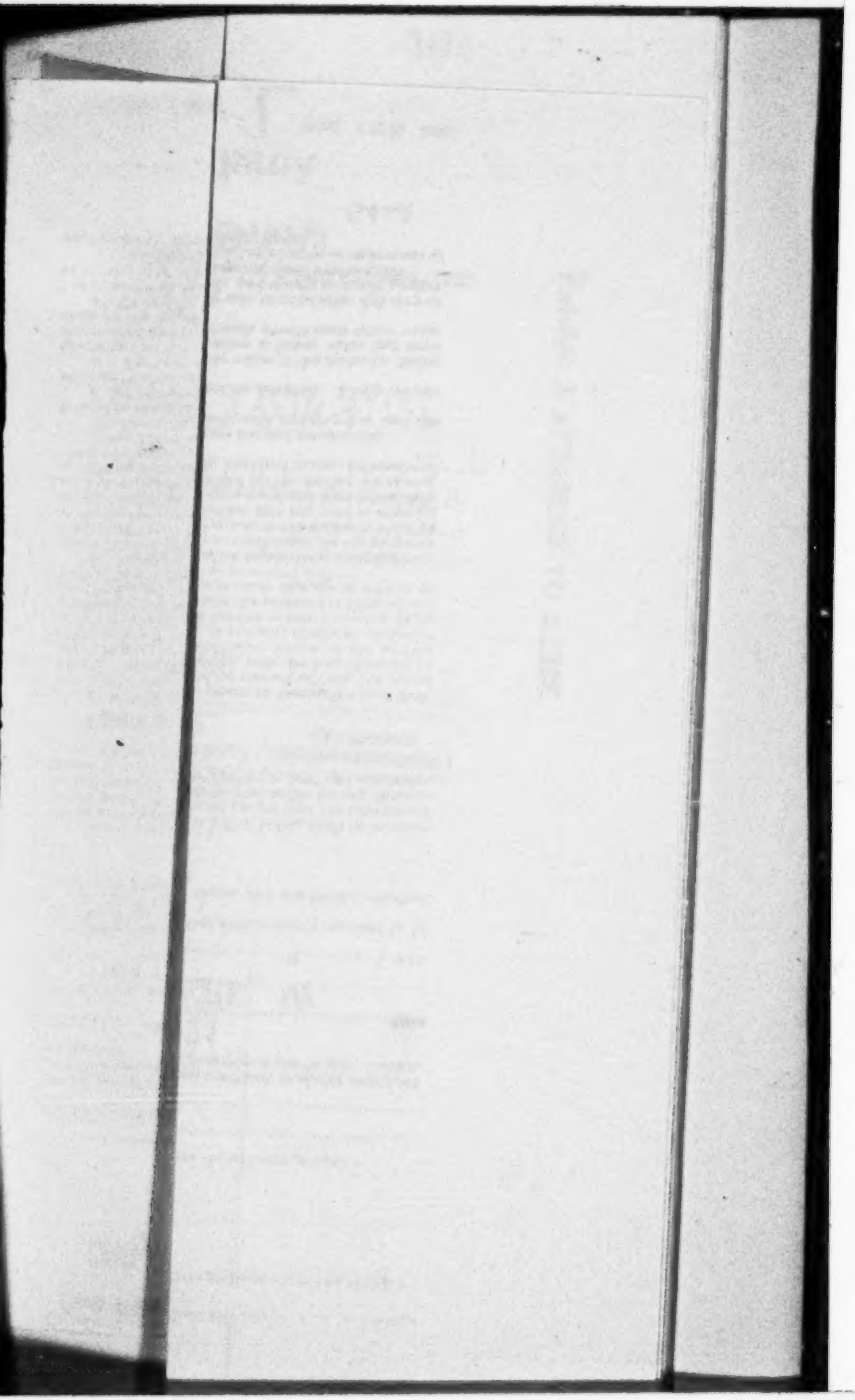
[fol. 54] EXHIBIT J ANNEXED TO LIBEL

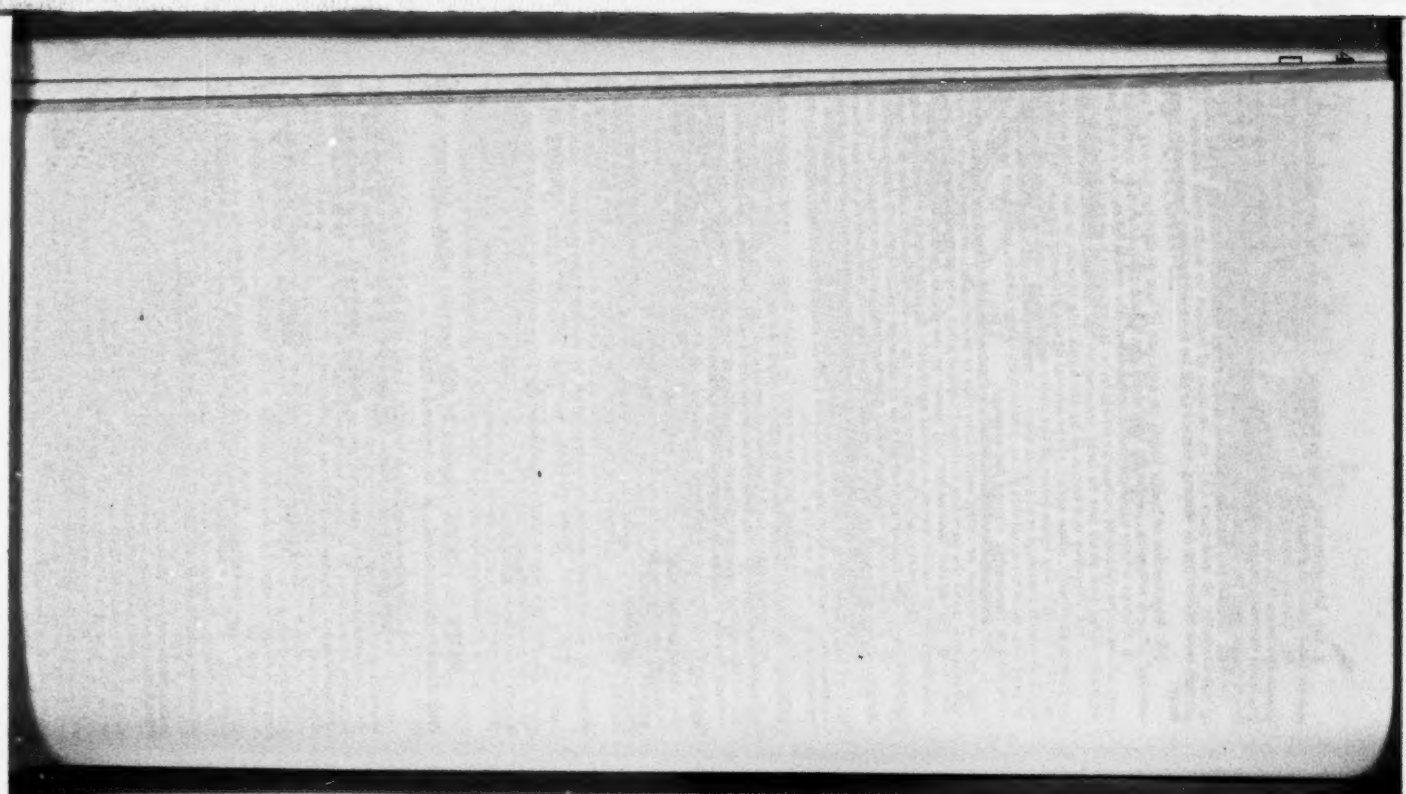
Bill of Lading, Dated Aug. 18, 1926

Front & Back

(Photoprints, 54-a and 54-b)

FOLD OUT IS TOO LARGE TO BE FILMED





[fol. 55] EXHIBIT K ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 13, 1926

Front & Back

(Photoprints, 55-a and 55-b)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 56] EXHIBIT L ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 20, 1926

(Photoprint, 56-a)

FOLD OUT IS TOO LARGE TO BE FILMED

L Bill of Lading L

Form 17-A

UNIFORM THROUGH EXPORT BILL OF LADING

(Prescribed by the Interstate Commerce Commission)

ORDER BILL OF LADING ORIGINAL

THE CHICAGO AND ALTON RAILROAD COMPANY

WILLIAM W. WHEELOCK AND WILLIAM G. BIRD, RECEIVERS

IN CONNECTION WITH OTHER CARRIERS ON THE ROUTE

Export Bill of Lading No. 1748 Lot No. Contract Number NEUMAN 947

Dated at KANSAS CITY MO this 20TH day of AUG 1926, 192

Received, subject to the classifications and tariffs in effect on the date of the receipt of the property described in this bill of lading, at KANSAS CITY MO

From ARMOUR AND COMPANY

The following property, in apparent good order (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below:

Consigned to ORDER OF ARMOUR & CO LTD

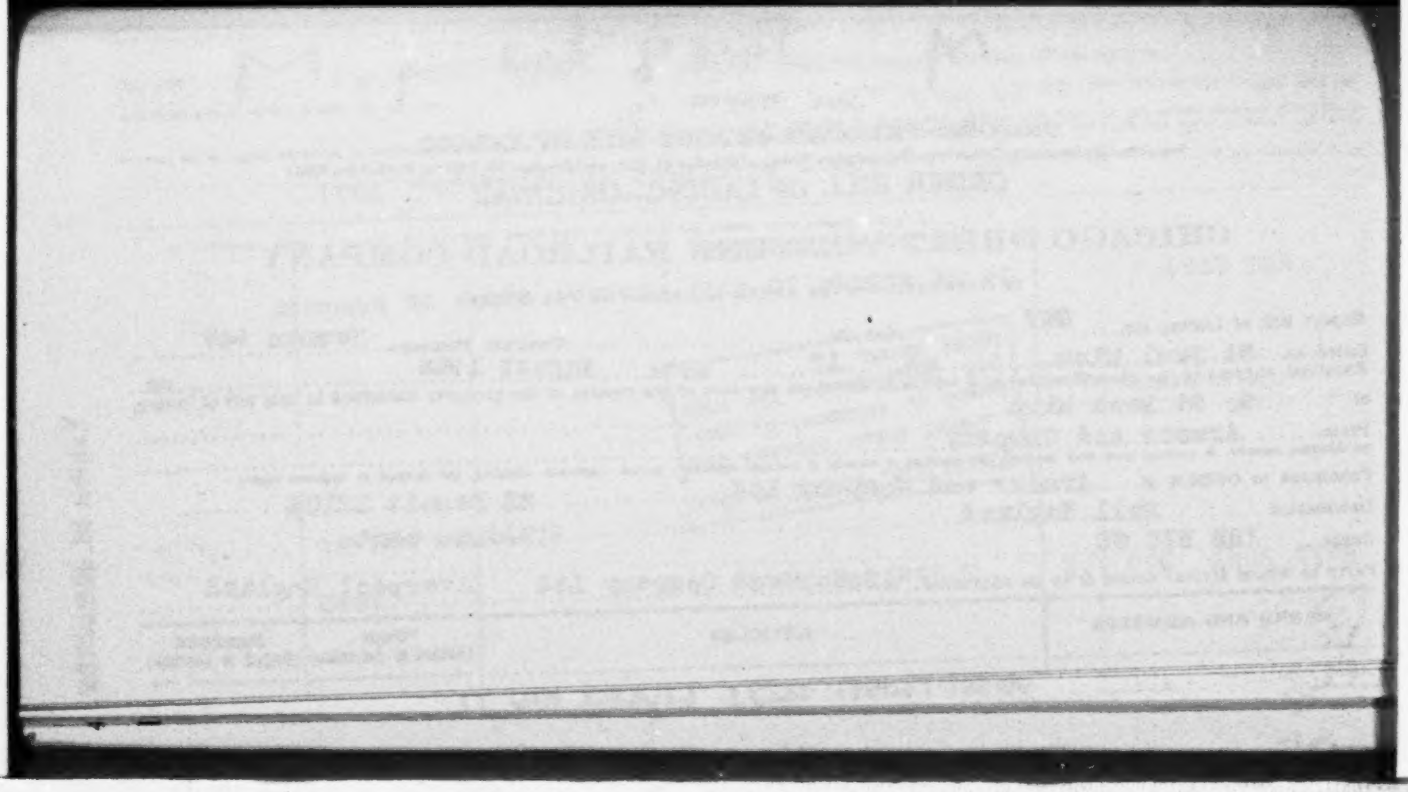
Destination HULL ENGLAND

Route WS RR PERMIT 12293 LICENSE RAC 77

If to whom arrival notice is to be addressed ARMOUR & CO LTD LIVERPOOL ENG

MARKS AND NUMBERS	ARTICLES	SHIPPER'S Weight (subject to correction).	Measurement (subject to correction).
(L)			

Exhibit L ATTACHED TO LIBEL



[fol. 57] EXHIBIT M ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 17, 1926

(Photoprint, side folio 57-a)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 58] EXHIBIT N ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 21, 1926

(Photoprint, side folio 58-a)

FOLD OUT IS TOO LARGE TO BE FILMED

L-25 200m (WBO 179486) THIS IS U. S. A. N Bill of lading N

UNIFORM THROUGH EXPORT BILL OF LADING

(Prescribed by Interstate Commerce Commission Orders of October 31, 1921, and January 26, 1922, in Docket No. 6665.)

ORDER BILL OF LADING—ORIGINAL

The New York Central Railroad Company

IN CONNECTION WITH OTHER CARRIERS ON THE ROUTE

NEW YORK CENTRAL LINES

MERCHANTS DESPATCH

RED LINE WEST SHORE LINE WHITE LINE

JERSEY CENTRAL-LAKE SHORE DESPATCH

Export Bill of Lading No. 38244 Lot No. ..... Contract Number NEUMANN 947

Dated at CHICAGO ILL this 21ST day of AUG 1926 192..

Received, subject to the classifications and tariffs in effect on the date of the receipt of the property described in this bill of lading, at CHICAGO ILL

From ARMOUR & COMPANY

the following property, in apparent good order (contents and condition of contents of packages unknown) marked numbered, consigned and destined as indicated below:

Consigned to ORDER OF ARMOUR & COMPANY LTD

Destination HULL ENGLAND

Route NYC WS

Party to whom arrival notice is to be addressed ARMOUR & COMPANY LTD LIVERPOOL ENGLAND

MARKS AND NUMBERS	ARTICLES	*Weight (subject to correction).	Measurement (subject to correction)
(1)			

J. P. BRADY ..... New York, N. Y.
Foreign Freight Ag't, N. Y. C. R. R. Co.

W. V. CARROLL ..... Chicago, Ill.
Export Freight Ag't, N. Y. C. Lines

L. H. PETERS ..... Boston, Mass.
Foreign Freight Ag't, B. & A. R. R.

C. W. BOYNTON ..... Boston, Mass.
General Agent, B. & M. R. R.

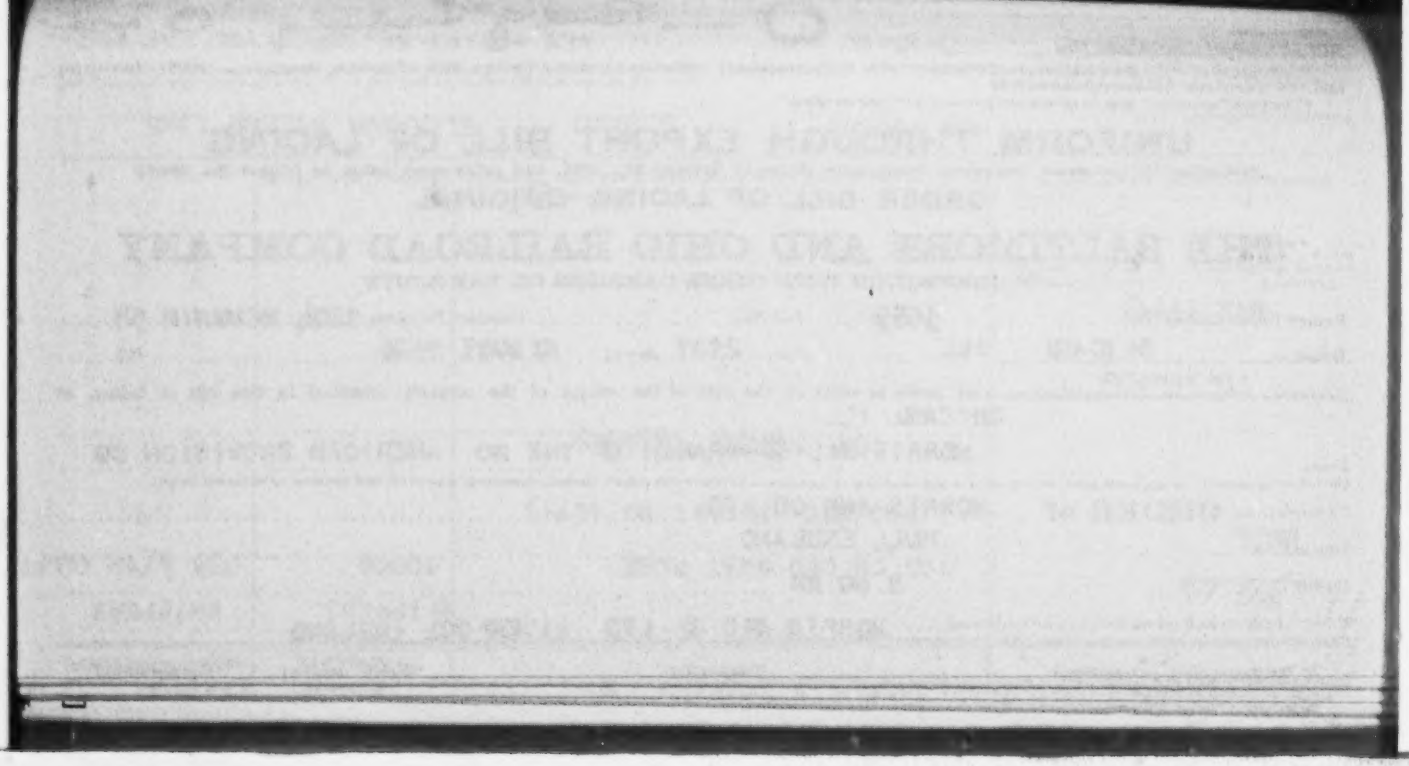
H. C. STAUFFER ..... Philadelphia, Pa.
General Freight Ag't, P. & R. Ry.

AMERICAN EXPRESS COMPANY,
General Foreign Agents, 65 Broadway, New York.

AMERICAN EXPRESS SYSTEM
Principal Offices in Europe.

LONDON	6	Haymarket
	84	Queen Street
PARIS	11	Rue Scribe
	54	Rue Des Petites Ecuries
AMSTERDAM	101	Kalverstraat
ANTWERP	87	Place De Meir
ATHENS	24	Stadium Street
BORDEAUX	8	Cours De Georges
BERLIN	45	Charlotten Strasse
BREMEN	22	Bahnhofstrasse
BRUSSELS	124	Blvd. Adolphe Max
BARCELONA	17	Calle Pontonella
CONSTANTINOPLE	15	Rue Voivode-Galata
COPENHAGEN	6	Holmens Kanal
CHRISTIANA	2	Dronningens Gate
GLASGOW	3	West Nile Street
GENOA	17	Piazza Nunziata
HAMBURG	9	Alsterdamm
HAVRE	43	Quai D'Orleans
LIVERPOOL	31	James Street
MARSEILLES	24	Rue Cannebiere
NAPLES		Piazza Del Martiri
ROME	58-60	Piazza Di Spagna
ROTTERDAM	26	A Zuidblaak
SOUTHAMPTON	25	Oxford Street

Exhibit N. ATTACHED TO LIE



[fol. 59] EXHIBIT O ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 21, 1926

(Photoprint, side folio 59-a)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 60] EXHIBIT P ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 18, 1926

Front & Back

(Photoprints, side folios 60-a and 60-b)

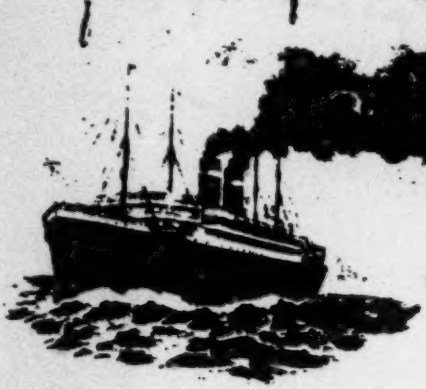
FOLD OUT IS TOO LARGE TO BE FILMED

P. Front

EXPORT BILL O

NEW YORK BOSTON PHILADELPHIA CHICAGO DETROIT

CABLE ADDRESS



OSAKA SHOSEN KAISHA.
(OSAKA MERCANTILE S. S. CO.

80 BROAD STR

RECEIVED subject to the Classifications and Tariffs in effect on the date of issue at New York, N. Y., from THE LEAVITT MACHINE COMPANY

property described below, in apparent good order, except as noted (contents and c consigned and destined and to be carried to LATEST below.
To be delivered to the good Steamer

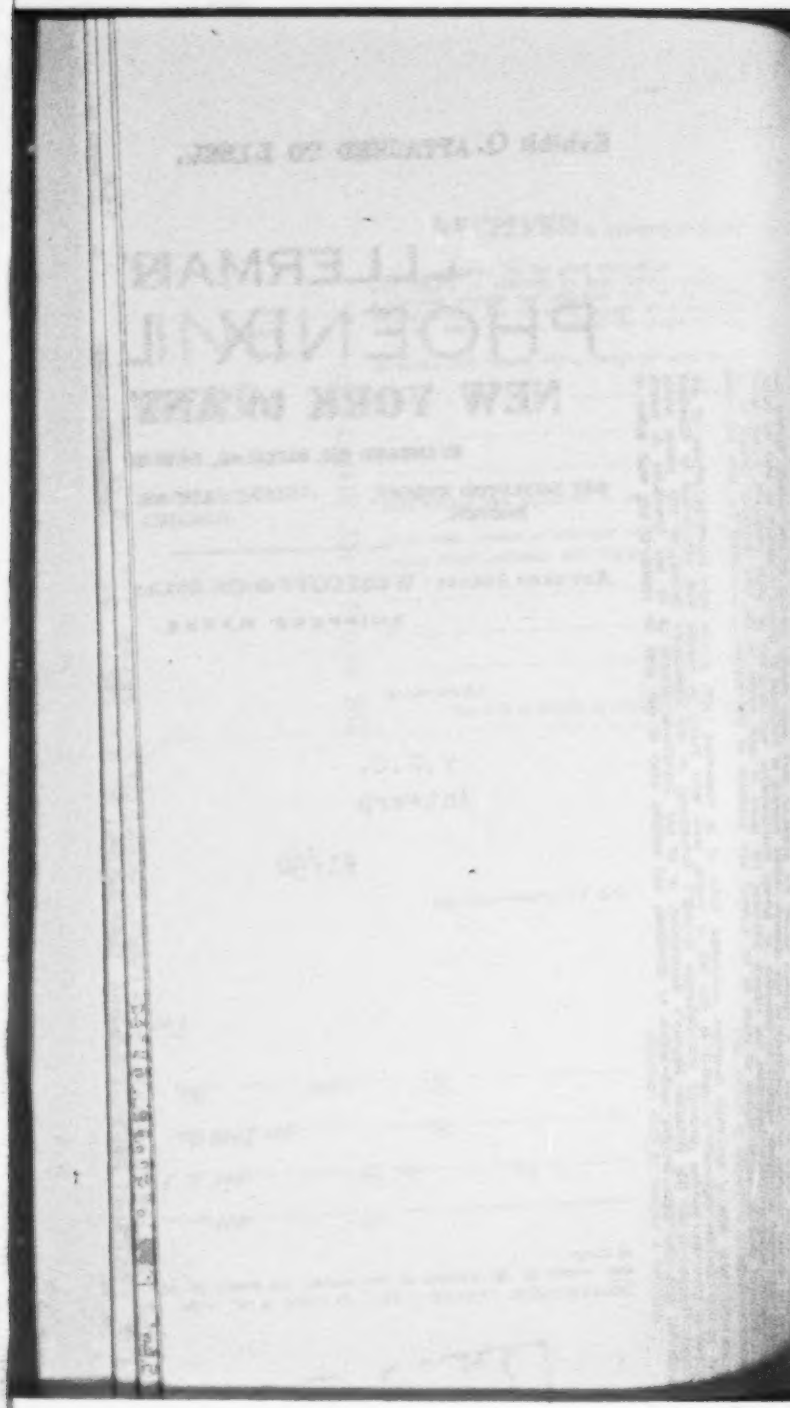
scheduled to sail AUGUST 27th, 1926

delivered in like order and condition at NEWCASTLE-on-TYNE, ENG
liberty to call at any port or ports in or out of the customary route, and to t signed, or to consignee's assigns, or to another carrier on the route to destina ment immediately on discharge of the property of the freight thereon, at th charges and average, without any allowance or drawback or discount.

CONSIGNED UNTO ORDER OF CALDWELL & COMPANY INC

ARTICLES: SIX (6) CASES VALVE RESEATING OUTFI

MARKS, NUMBERS OR ADDRESS AS ABOVE



[fol. 61] EXHIBIT Q ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 23, 1926

(Photoprint, side folio 61-a)

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 62] EXHIBIT R ANNEXED TO LIBEL

Bill of Lading, Dated Aug. 18, 1926

Front & Back

(Photoprints, 62-a and 62-b)

FOLD OUT IS TOO LARGE TO BE FILMED

MADE IN U. S. A.
Bill of Lading
Signature Certificate No._____

R Print — R

Form 1447
Through Bill of Lading issued
Bills of Lading Conference
"The word "agreement

UNIFORM THROUGH EXPO

Prescribed by Interstate Commerce Commission Orders of October 21, 1921, January 30, 192

ORDER BILL OF LADING

WABASH RAILWAY

IN CONNECTION WITH OTHER CARRI

Export Bill of Lading No. 4005 Lot No.

Dated at KANSAS CITY MO. this 18 day

Received, subject to the classifications and tariffs in effect on the date of the receipt of the property described in this bill of lading, at KANSAS

From WILSON & CO INC OF KANSAS

the following property, in apparent good order (contents and condition of contents of packages unknown)

Consigned to ORDER OF WILSON & CO INC

Destination HULL ENGLAND

Route WABASH NYC

Party to whom arrival notice is to be addressed WILSON & CO IN

MARKS AND NUMBERS	ARTICLES
W&CO 908 HULL	5 BOXES WILSON SP HAMS IN BORAX. NYC PERMIT SHIPPERS
CAR NUMBERS	
WCL 6027	

REGOR SPACE

[fol. 63] EXHIBIT S ANNEXED TO LIBEL

Statement of Shipments

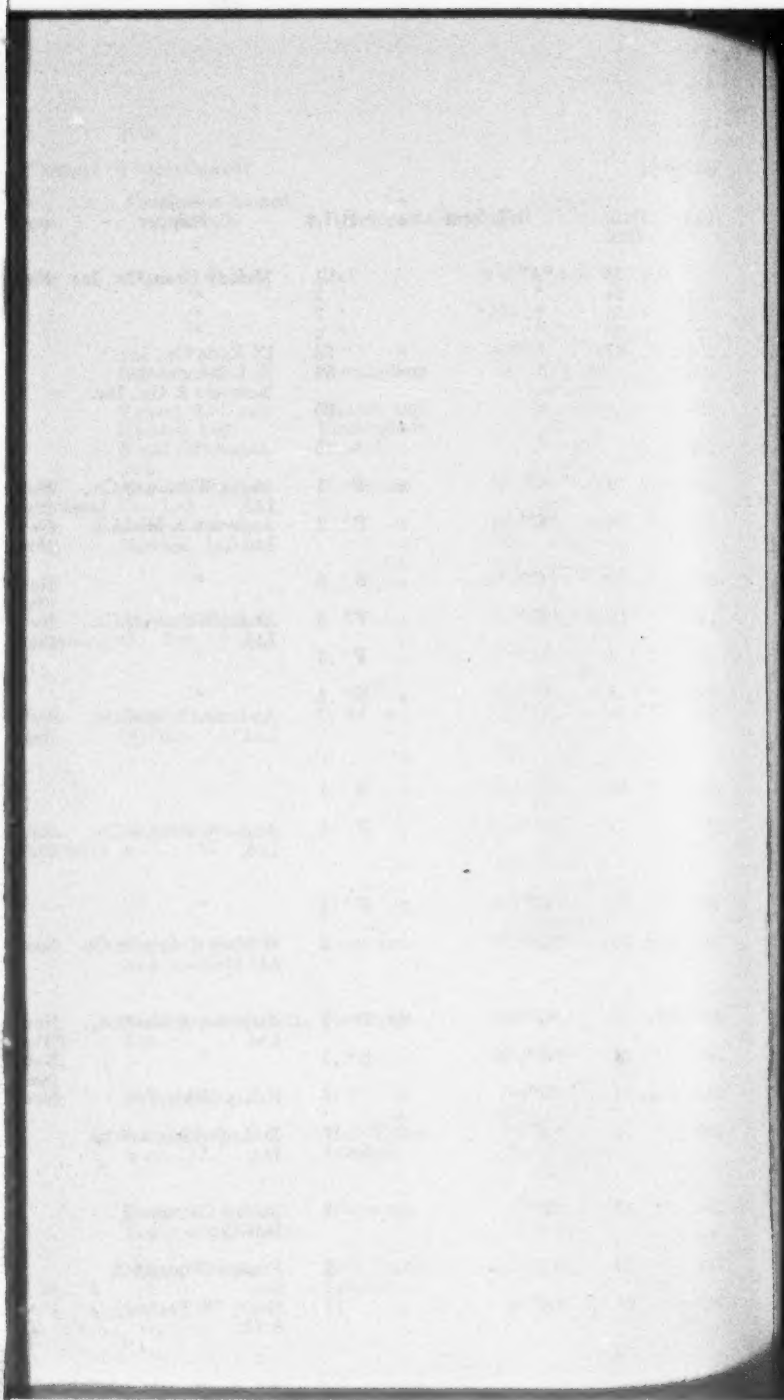
FOLD OUT IS TOO LARGE TO BE FILMED

(Here follows statement, side folios 63-a, 63-b, 64 & 64-b, 65 & 65-a, 65-b, 66 & 66-a, and 66-b)

[fol. 63-a]

EXHIBIT

Item	Date, 1926	B/L form	B/L#	Shipper	From	Con
1	Aug. 26	Ellerman Wilson line "A"	18	Earle & Stoddart, Inc.	New York	Ship
2	"	"	16	"	"	
3	"	"	17	"	"	
4	"	"	11	Sanday & Co.	"	
5	"	"	10	"	"	
6	"	"	8	"	"	
7	"	"	9	"	"	
8	"	"	13	"	"	
9	"	"	12	"	"	
10	" 20	Cleveland, Cincin., Chi. & St. Louis R. W. C. B/L "B"	9094	Kingan & Co.	" (Indianapolis)	King
11	" 19	"	9051	"	"	
12	"	"	9052	"	"	
13	"	"	9053	"	"	
14	"	"	9054	"	"	
15	"	"	9055	"	"	
16	"	"	9056	"	"	
17	"	"	9057	"	"	
18	"	"	9058	"	"	
19	"	"	9059	"	"	
20	"	"	9060	"	"	
21	"	"	9061	"	"	
22	"	"	9062	"	"	
23	"	"	9063	"	"	
24	"	"	9064	"	"	King
25	"	"	9065	"	"	King
26	"	"	9066	"	"	
27	"	"	9067	"	"	
28	"	"	9068	"	"	
29	"	"	9069	"	"	
30	"	"	9070	"	"	
31	"	"	9071	"	"	



[fol. 67] IN UNITED STATES DISTRICT COURT

ANSWER

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Ellerman's Wilson Line, Ltd. to the libel and complaint of Earle & Stoddart, Inc., et al., in a cause of contract and cargo damage, civil and maritime, alleges upon information and belief as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to the matters contained in paragraph numbered First of the libel.

Second. It admits the matters contained in paragraph numbered Second of the libel.

Third. It denies that Exhibit "S" is an accurate statement of the merchandise shipped on the steamship "Galileo". It denies that it has any knowledge or information sufficient to form a belief as to whether the consignments of merchandise mentioned, when shipped, were in good order and condition. It admits they were in apparent good order and condition when received.

Fourth. It denies the matters contained in paragraph numbered Fourth of the libel.

Fifth. It denies any breach of the contracts of carriage, and denies it has retained any proceeds from the sale of damaged cargo. It admits the other matters contained in paragraph numbered Fifth of the libel.

[fol. 68] Sixth. It denies that it has any knowledge or information sufficient to form a belief as to the matters contained in paragraph numbered Sixth of the libel.

Seventh. It denies the matters contained in paragraph numbered Seventh of the libel.

Eighth. It admits that the time within which the libel-ants might commence suit for non-delivery or damage covered by the bills of lading was extended by the respondent. It denies the other matters contained in paragraph numbered Eighth of the libel.

Ninth. It admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. It

denies the other matters contained in paragraph numbered Ninth of the libel.

Further answering and by way of defense the respondent alleges as follows:

Tenth. I. On or about the 28th day of August, 1926, the steamship "Galileo", having on board a general cargo consigned to Hull and/or Newcastle and/or Antwerp, sailed from the Port of New York bound for the Port of Hull, England. The said vessel was in all respects seaworthy, properly equipped, manned and supplied.

At or about 4:30 P. M. on August 28, 1926, after the vessel had sailed from the Port of New York and was at sea proceeding on its voyage to Hull, smoke was observed coming from a ventilator on board the "Galileo". An examination was made and it was discovered that a fire had [fol. 69] broken out in one of the holds of the said steamship. The master thereupon decided to return to the Port of New York.

Diligent efforts were made to extinguish the said fire while returning to the Port of New York, all the ventilators being covered in an effort to smother the fire.

In due course the vessel arrived at the Port of New York where every possible effort was made to extinguish the fire.

After considerable water had been pumped into the vessel, both by the ship's hose and the fireboats which attended the vessel, in an attempt to extinguish the fire, the master decided to beach the vessel on the Weehawken Flats. This was done. By reason of the fire and the quantity of water pumped into the vessel by the fire boats in an attempt to extinguish the fire, the vessel finally capsized, filled with water and sank on the Weehawken Flats. The said vessel and all of its cargo, except a small part thereof which was subsequently salvaged, became a total loss.

II. All the loss and damage which may have happened to any merchandise whatsoever, referred to in the libel herein, was caused by reason or by means of the aforesaid fire happening on board the "Galileo".

III. By reason of the premises and under the provisions of Section 4282 of the Revised Statutes of the United States, the respondent is not liable to answer for or make good to any person any loss or damage which may have happened to the merchandise referred to in the libel herein.

[fol. 70] Further answering and by way of a second defense the respondent alleges as follows:

Eleventh. I. The merchandise mentioned in the libel was shipped under various forms of bills of lading, which bills of lading constituted the contract of carriage between the parties. These bills of lading, although not similar in all respects, all contained a clause exempting the carrier from liability for "loss or damage occasioned by fire from any cause or wheresoever occurring."

The loss or damage referred to in the libel herein was occasioned and/or caused by a fire which took place on board the steamship "Galileo" after the merchandise had been loaded thereon.

II. By reason of the premises the respondent is not liable for any of the loss or damage mentioned in the libel.

Further answering and for a further and partial defense the respondent alleges:

Twelfth. The merchandise mentioned in the libel was shipped under various forms of bills of lading. These bills of lading, although not similar in all respects, all contained a clause limiting the carrier's liability to the various amounts mentioned in the respective bills of lading, unless a higher value was declared thereon and freight paid accordingly.

Higher values than those indicated in the respective bills of lading were not stated by the shippers. If the respondent is liable in any respect herein, the value placed on the merchandise referred to in the libel should not be higher than as indicated in the various clauses of the above mentioned bills of lading.

[fol. 71] Wherefore respondent prays that the libel herein be dismissed with costs, or that the Court will grant to the respondent such other and further relief as the justice of the cause may require.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent. Office and P. O. address: No. 27 William Street, Borough of Manhattan, City of New York.

Duly sworn to by Chas. H. Georgi. Jurat omitted in printing.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONDENT'S EXCEPTIONS TO INTERROGATORIES ATTACHED TO LIBEL

The respondent excepts to the interrogatories attached to the libel herein on the ground that they are incompetent, irrelevant and immaterial.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent. Office & P. O. address: No. 27 William Street, Borough of Manhattan, City of New York.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING RESPONDENT'S EXCEPTIONS TO INTERROGATORIES ATTACHED TO LIBEL—Oct. 7, 1927

The exceptions of the respondent to the interrogatories attached to the libel herein having duly come on for hearing on the Admiralty Motion Calendar of the above entitled Court, and after hearing James H. Herbert, Esquire, of Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for respondent, in support of said exceptions, and after hearing James W. Ryan, Esquire, of Messrs. Bigham, Englar & Jones, proctors for libellants, in opposition thereto, and due consideration having been had, and good cause appearing therefor,

It is hereby ordered, adjudged and decreed that the said [fol. 74] exceptions of the respondent to the interrogatories attached to the libel herein be and the same hereby are overruled, and the respondent is directed to file answers to the same within 15 days after the service on them of a copy of this order.

F. A. Winslow, U. S. D. J.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF WINSLOW, D. J., OVERRULING RESPONDENT'S EXCEPTIONS TO LIBELLANT'S INTERROGATORIES

Exceptions are overruled.

F. A. W., D. J.

Oct. 7, 1927.

IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONDENT'S ANSWERS TO INTERROGATORIES ATTACHED TO LIBEL

The respondent answering the interrogatories attached to the libel herein, states upon information and belief as follows:

Answer to first interrogatory: The cause of the fire on [fol. 75] board the S. S. "Galileo" is unknown to the respondent.

Answer to second interrogatory: (a & b) Respondent is unable to say where the fire broke out.

Answer to third interrogatory: (a) One lot of the coal in No. 3 'tween decks was put aboard the "Galileo" on or about June 30, 1926; the other lot was placed aboard on or about August 26, 1926.

(b) All coal was supplied by the Morrisdale Coal Company, 17 Battery Place, New York City.

(c) All coal in No. 3 'tween decks is believed to have been Morrisdale Miller Seam Coal, a bituminous coal.

(d) The respondent has no knowledge as to where the coal came from other than that it was purchased from the Morrisdale Coal Company.

(e) Each lot of coal was loaded on the "Galileo" in the harbor of New York.

(f) The relation of the stowage of these two lots of coal was that the first lot of coal was scattered about in No. 3 'tween decks, and the second lot of coal was stowed on top or alongside of the first lot.

(g) The first lot of coal had been on board since about June 30, 1926. The second lot of coal had been on board since on or about August 26, 1926.

[fol. 76] (h) The first lot of coal had been in No. 3 'tween decks since about June 30, 1926; the second lot since about August 26, 1926.

(i) The temporary wooden bulkhead was in good condition but was not supposed to be watertight.

(j) The respondent is unable to answer this question definitely at the present time, but is endeavoring to obtain the information and will supply it so soon as it is received.

(k) Same answer as (j).

Answer to fourth interrogatory: (a, b & c) The only information which the respondent has with respect to these interrogatories is contained in the survey report attached hereto in answer to the sixth interrogatory.

Answer to fifth interrogatory: The "Galileo" was proceeding to sea and was in the neighborhood of Fire Island Light Vessel when the first indications of a fire were observed.

Answer to sixth interrogatory: The scrap or rough deck and engine rooms logs were lost with the sinking of the vessel. The survey report is attached hereto.

Answer to seventh interrogatory: By reason of the absence of the crew of the vessel the respondent is at present unable to answer this interrogatory. The information will be supplied as soon as it is obtained.

Answer to eighth interrogatory: Same as answer to seventh interrogatory.

Answer to ninth interrogatory: Upon information and belief the fire continued until the vessel submerged on August 30, 1926, at about 4:50 A. M.

[fol. 77] Answer to tenth interrogatory: Upon information and belief, yes.

Answer to eleventh interrogatory: Upon information and belief the offer of assistance was temporarily refused.

Answer to twelfth interrogatory: The offer was temporarily refused by the master in the exercise of his best judgment.

Answer to thirteenth interrogatory: (a) Upon information and belief, yes.

(b) Upon information and belief, yes.

(c) Upon information and belief the offer was temporarily refused.

(d) In the exercise of the master's best judgment.

Answer to fourteenth interrogatory: (a) At the present time the respondent is unable to make any other answer than that the master refused the offer of assistance in the exercise of his best judgment.

(b) No.

Answers to fifteenth and sixteenth interrogatories. The libellant has, with the permission of the respondent, obtained copies of all such communications from the Radio Corporation of America.

Answer to seventeenth interrogatory: (a) Attempts were made to extinguish the fire first, by smothering, and then by the ship's and fireboats' hose.

(b) Upon information and belief, no.

[fol. 78] Answer to eighteenth interrogatory: (a & b) Some coal, the exact amount being unknown except that it was possibly in excess of thirty-five tons, was shifted from No. 3 shelter deck to the side pockets and on deck.

Answer to nineteenth interrogatory: (a, b & c) No, the vessel was submerged or at least to a great extent, and no observations were possible.

Answer to twentieth interrogatory: Because the vessel as a result of the fire was almost entirely submerged.

Answer to twenty-first interrogatory: See protest attached.

Answer to twenty-second interrogatory: See survey and report attached.

Report

Charles E. Ross, Naval Architect-Engineer, Surveyor, 16 Exchange Place, New York

August 15, 1927.

Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street, New York City, N. Y.

Dear Sirs:

S/S "Galelio"

At your request, we examined the S/S "Galelio", while she laid off Gravesend Bay, off Bath Beach, New York, on August 13, 1927.

[fol. 79] At the time of the examination, the vessel was listed, say 25° to starboard.

The Merritt-Chapman & Scott wrecking boats and scows were alongside washing down and pumping into scows there grain, mud and debris. The pumping was being carried on mostly in way of No. 2 hold.

There were evidences of fire in No. 2 lower 'tween decks (space below the shelter deck space) between Nos. 2 and 3 hatches, just aft of No. 2 hatch on the port side of the vessel.

There was practically no damage to the deck at the lower 'tween deck level, but the deck over the between decks forming the bottom of the shelter deck was badly buckled.

There was a wood deck stringer extending entirely across the vessel; this stringer was evidently for a wood bulkhead, which bulkhead was located about 14 feet aft of No. 2 hatch. There was some coal on the after side of this line of wood stringer. This coal was on the starboard side of the vessel, and the coal there was about 18 inches to 24 inches in height above the deck.

The greatest damage by fire appears to be about 12 feet aft of No. 2 hatch, and about 13 feet inboard from the port side of the vessel. This greatest damage appears in way of a girder there. This would make the greatest amount of damage about 2 feet forward of the wood bulkhead.

The 'tween deck space, in way of Nos. 2 and 3 hatches, is about forty-seven frame spaces long, each frame space measuring about 27 inches.

Calling the aftermost space No. 47, the fire damage extends from about frame No. 19 to frame No. 27, and the wood bulkhead above referred to was located at about frame [fol. 80] No. 26; that is, the fire damage apparently extends about one frame space after the wood bulkhead, and most of the damage from No. 19 to No. 26 is forward of the wood bulkhead, or where cargo was stored.

The vessel is still quite dirty and no further examination was made.

(Sgd.) Chas. E. Ross, Surveyor. (Sgd.) C. L. Burke, Surveyor Attending.

UNITED STATES OF AMERICA

STATE OF NEW YORK,
City of New York, ss:

By this public instrument of declaration and protest, be it made known and manifest to all whom it may concern, that on the — day of ——, in the year one thousand nine hundred and ——, before — personally appeared Charles Barron master of the Str. "Galileo" of Hull of about 4091 tons net register, and noted with him, in due form of law, his protest for the uses and purposes hereinafter mentioned. And now on this First day of September in the year 1926 before me Seymour Page a notary public in and for the county of New York in the State of New York, duly commissioned and sworn, and practising in the City of New York and State aforesaid, comes the said master, and requires me to extend his said protest, and together [fol. 81] with him come and appear, F. Ellison, J. C. Oxtoby, T. Golightby and J. McKee, all belonging to the aforesaid vessel, all of whom being by me duly sworn depose and say that the said vessel laden with Grain and General Cargo, being in every respect seaworthy, and in all things fitted and provided for her intended voyage, sailed on the 28th day of August, 1926, from New York bound to Hull, Newcastle and Antwerp. That she returned to New York on Aug. 29th, 1926, the incidents of the voyage being fully set forth in the within narrative.

"Galileo"

Aug. 28, 1926.—At 10:17 A. M. this vessel left her berth at the Ellerman-Wilson Line Pier, Hoboken, with grain and a general cargo, for Hull, Newcastle and Antwerp. At 11:52 A. M. she anchored in Gravesend Bay for the purpose of loading powder. At 12:50 P. M. the anchor was weighed and the vessel proceeded to sea. There was a light to moderate wind with a slight sea, and the weather was fine and clear. At 4:35 P. M. smoke was observed coming from the forward starboard ventilator at No. 3 hold, and it was decided to put back to Gravesend Bay. At 8:30 P. M. the smoke increased in volume from the No. 3 starboard ventilator and the ventilator cowls were covered up. At 10:10 P. M. the vessel anchored in Gravesend

Bay and a message was sent out requesting the vessel's agents in New York to arrange for laborers to come and move bunker coal. The powder was then moved from the magazine to the upper deck.

Aug. 29, 1926.—At 1 A. M. a wireless message was sent [fol. 82] out for a fireboat to stand by. At 3 A. M. a fireboat was alongside, but was informed that assistance was not required. During the morning there was a fresh strong W. N. W. wind and the weather was fine and clear. At 10:20 A. M. laborers came on board and commenced discharging powder from the upper deck to a lighter. At 10:55 A. M. the discharge of powder was completed and the anchor was weighed and the vessel proceeded to Weehawken with a pilot aboard. At noon the laborers commenced moving coal from No. 3 hold to side pockets. At 12:40 P. M. the vessel anchored below 34th Street Ferry, Weehawken. At 5:30 P. M. the laborers ceased working on account of smoke; they had previously been working at intervals. At 5:32 P. M. commenced pumping water into No. 3 hold from the ship's hose. At 6:40 P. M. sent a wireless for a fireboat and the ship's hose was pumping water into No. 2 'tween deck. At 7:20 P. M. the fire boat "James Duane" came alongside and commenced pumping water into No. 2 'tween deck. Twenty-five minutes later the ship commenced to list to starboard and at 8 P. M. the crew commenced working coal out of No. 3 hold. At 11:30 P. M. the vessel had a list of 20° to starboard. At 11:55 P. M. the anchor was weighed and the vessel was beached on the West Shore, near 34th Street Ferry. The vessel then had a list of 25° to starboard.

Aug. 30, 1926.—The fireboat continued to pump water into Nos. 2 & 3 holds. At 2:30 A. M. the salvage steamer "Chapman Brothers" and the tug "Alert" came alongside to assist in holding the ship on the beach, and at 2:45 A. M. a second fireboat arrived and commenced pumping water [fol. 83] immediately. At 4 A. M. the vessel commenced to list further and at 4:50 A. M. she turned over on her beam ends, broadside on the beach.

And deponents further say, that the said vessel was, at the commencement of the voyage, staunch and strong, and had her cargo well and sufficiently stowed, and her hatches properly closed and secured; and that during the said

voyage they, together with the rest of the crew, used their utmost endeavors to preserve the said vessel and her cargo, tackle and apparel from damage or injury. And that any loss, damage or injury which has arisen or accrued, or that may arise or be sustained, in any way or manner whatever, is solely due to the accidents and difficulties herein set forth, and not to any negligence, want of skill, vigilance or exertion on the part of deponents, or any of the officers or men of the said vessel.

(Signed) Master, C. Barron. Chief Officer, F. Ellison. Chief Engineer, J. C. Oxtoby. Boatswain, Thomas Golightby. A. B., Joseph McKee.

Wherefore the said master hath requested me to protest and at his request I do publicly Protest, against all persons whom it may concern, and against the accidents, casualties and circumstances already set forth in the foregoing declaration, for all manner of losses, costs, damages, charges, expenses and injuries whatsoever, which the said vessel and her cargo on board and the freight by her earned, or to be earned, or either of them or any part thereof, have already [fol. 84] sustained, or may hereafter sustain, by reason or means of the foregoing premises.

Thus done and protested in the City of New York, this 1st day of September, in the year one thousand nine hundred and twenty-six.

In testimony whereof I have hereunto set my hand and affixed my notarial seal.

(Sgd.) Seymour Page, Notary Public, New York County. N. Y. Co. Cl'k's No. 222, Reg. No. 8253. Commission expires March 30, 1928. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

I, Seymour Page, a notary public in and for the county of New York, and practising in the City of New York, do certify the foregoing to be a copy of an original protest made before me.

In testimony whereof I have hereunto set my hand and notarial seal this 2nd day of November, one thousand nine hundred and twenty-seven.

(Signed) Seymour Page, Notary Public, New York County. N. Y. Co. Cl'k's No. 222, Reg. No. 8253. Commission expires March 30, 1928. (Seal.)

[fol. 85] September 1, 1926.

Messrs. Ellerman's Wilson Line, Inc., Hull, England.

DEAR SIRS: I have to confirm cable sent by the New York Office Company, advising "Galileo" was sunk on fire in New York Harbor at 4:50 A. M. Monday, August 30th. The circumstances are as follows:

We sailed from New York at 10:30 A. M. August 28th, and proceeded to Gravesend Bay and loaded eight tons of gunpowder, sailing from there at 12:50 P. M. At 4:40 P. M. when off Fire Island Light Vessel, smoke was observed coming from No. 3 Hold Ventilator, starboard side, and smelt as though wood was burning. As No. 3 Tween Deck and Shelter Deck was full of bunker coal shifted in New York during the week on top of about 160 tons of coal left from previous voyage, I came to the conclusion that spontaneous combustion had set fire to the bunkers and bulkhead between No. 2 and 3 Tween Deck on the spar ceiling. We took No. 2 hatches off and found no smell of fire in No. 2 Tween Deck, which contained spelter and about 8000 boses of lard in the after part. I decided to return to New York, and at 5:19 P. M. turned the ship around. I blocked off all ventilation to exclude air, concluding this best thing to do until our arrival back in New York when assistance could be obtained to shift coal to get at the seat of fire, which meant shifting from 250 to 300 tons. I sent a wireless to Wilsonlyn New York "Bunkers in No. 3 tweendeck on fire returning New York arriving Ambrose Light Vessel 8:30 suggest bunkers discharged or shifted to No. 2 [fol. 86] shelter deck" which was empty. After taking on Pilot on Board we anchored in Gravesend Bay at 1:10 P. M. I sent a wireless to Wilsonlyn New York "Anchored Gravesend Bay suggest sending gang off to discharge bunkers now on fire". The crew commenced getting up the 86 cases of gunpowder on deck; handy to discharge or throw overboard in case of emergency.

At 2.00 A. M. received wireless message "Labor will arrive as soon as possible". At 10:20 coal laborers and Mr. Sanderson with tug "Powder Lighter" arrived; Gunpowder was discharged and we got under way, and proceeded up the river and anchored off Weehawken at 0.40 (about one mile above our Hoboken pier); meantime,

laborers removing bunkers from No. 3 hold into side bunkers and on deck. At 5:30 laborers ceased working coal on account of smoke. As No. 2 Tween Deck by this time was getting hot, we commenced pumping water into No. 3 Shelter Deck from ship's bow. By this time laborers had shifted about 35 tons bunkers. At 6:40 sent wireless message for Fire Boat. At 7:20 Fire Boat alongside commenced pumping water into No. 2 Tween Deck, from which smoke was now issuing when hatches were taken off. At 8:00 P. M. crew working coal from No. 3 Shelter Deck. At 11:00 P. M. crew compelled to stop working the coal as dense smoke was by this time issuing from No. 3 Tween Deck. At 11:10 Fireman got hoses down No. 3 Tween Deck and commenced pumping water into ship. By this time ship had a 21° list to starboard and chief of Fire Boat informed me that fire was growing and sent wireless to send another Fire Boat, also that it was advisable to beach the [fol. 87] ship, as he was going to put two six ft. pipes in the ship. At 11:55 I hove up anchor and beached the ship which lay about one-quarter mile away on the Jersey side of the river and was composed of soft mud. We took soundings which showed 17 ft. over the stem, 28 ft. amidships and 40 ft. over the stern. By this time the ship had a 25° list.

About 12:45 A. M. August 30th another Fire Boat came alongside and commenced pumping water into No. 2 and 3 Tween Decks. By this time dense columns of smoke were issuing from No. 2 and 3 Tween Decks, also flames. At 2:00 A. M. sent wireless message for two tugs to assist keeping ship on bank as by this time the first of the flood tide had commenced and the ship was still listing and slewing broadside on to the beach and inclined to slip off. Two salvage steamers arrived about 2:30 A. M. and took up position on port bow and port quarter and held ship broadside on to beach. Ship had now a list of 21°, having come up 5°. About 4 A. M. the ship commenced listing heavy to 26°. At 4:15 list 30° and 4:30 list 35°. Up to this time I did not think it possible that the ship would turn over on her beam ends, when suddenly she keeled over until the water flowed over the hatch combings and she laid on her beam ends at 4:50 and was submerged about 32 ft. starboard side under water heading about S. W.

The crew saved most of their effects, but the Officers, Engineers and myself lost nearly everything as we did not

realize, as I have stated before, that the ship would sink.

The crew are leaving here tomorrow except the Chief Engineer, Chief Officer and myself, the W/U Operator [fol. 88] being transferred to another ship here.

I very much regret having to report this catastrophe, but I did my best under the circumstances for everyone concerned.

I am dear sirs,

Yours obediently, —— ——, Master.

Duly sworn to by Chas. H. Georgi. Jurat omitted in printing.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING LIBEL—Oct. 25, 1928

On the annexed consent, and on motion of Bigham, Englar & Jones, proctors for the libellants herein, it is

Ordered that the libel heretofore filed herein be and the same hereby is amended in the following respects:

1. The names of Anderson & Mishkin, Ltd., William S. Gray & Co., Herbert Smart & Co., Ltd., Barter Trading Co., Ltd., Henry Heide, Inc., British Merchants, Inc., Ltd., D. L. [fol. 90] Sterling and Sons, Inc., John Trauers & Son, Ltd., Bray Gibb & Co., Ltd., Robins Conveying Belt Co., Fraser & Chalmers Engineering Works, International Combustion, Ltd., Eugene Donzelot & Son, F. W. Berk & Co., Ltd., Haines Coote & Co., Henry W. Peabody & Co. be stricken out as parties libellant.

2. Sub-paragraphs numbered 133 to 150, inclusive, of the first article of the libel be stricken out.

3. Items numbered 229 to 246, inclusive, of Exhibit S, annexed to and made a part of the libel, be stricken out.

4. The amount of damages demanded in the seventh article of the libel be reduced from the sum of Seven hundred thousand ($700,000.00) Dollars to the sum of Six hundred and fifty thousand ($650,000.00) Dollars.

J. W. Mack, U. S. C. J.

Consent is hereby given to the entry of the foregoing order.

Dated New York, October 24, 1928.

Kirlin, Woolsey, Campbell, Hickox & Keating,
Proctors for Respondent.

[fol. 91] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 96/206

EARLE & STODDART, INC., et al., Libelants,

vs.

ELLERMAN'S WILSON LINE, LTD., Respondent

Before Hon. Frank J. Coleman, District Judge

Statement of Evidence

New York, November 6, 1929—10:30 A. M.

APPEARANCES

Messrs. Bigham, Englar & Jones, Proctors for libelants; Mr. Jones and Mr. Ryan of counsel.

Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for respondent; Mr. Keating, Mr. Potter, and Mr. Herbert, of counsel.

The claims of the libel and answers are stated.

Mr. Jones: I move that the answer be stricken from the files until the information sought for in the seventh interrogatory is produced.

Mr. Keating: We are prepared to supply that now.

Mr. Jones: Will you call your man——

Mr. Keating: No, I will answer it the way an interrogatory should be answered——

[fol. 92] Motion denied.

Exception.

Mr. Jones: I ask that the papers be produced. I asked him to produce——

Mr. Keating: If your Honor please, I understand Mr. Jones is opening his case. We will produce them at the trial.

The Court: He has the right to ask you for them now.

Mr. Keating: Do you wish me to produce them now, sir?

The Court: If Mr. Jones requested them, certainly.

(The papers are produced.)

Mr. Jones: I file with the Court for the Court's convenience the interrogatories and answers to the interrogatories which have been typed by my office in sequence, so that they will be more readily read. (Handing copy to counsel.) Are these all the plans you have of this ship?

Mr. Keating: I am not sure there isn't another one. That is the builder's plan. (Handing to Mr. Jones.)

Frank C. Weitzman, called as a witness on behalf of the libelant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. You are a photographer, are you not, Mr. Weitzman?

A. Yes, sir.

Q. And at our request did you go on board the steamship "Galileo" for the purpose of taking photographs?

A. I did.

Q. Do you know the date on which you went aboard?

A. I made two trips; I went down on August 13th and 17th, 1927.

[fol. 93] Q. Have you the negatives which you took at the time?

A. I have.

Q. I show you a photograph——

The Court: Have you seen these, Mr. Keating?

Mr. Keating: No, I haven't.

The Court: Why don't you look at them and perhaps they may be put in evidence?

Mr. Jones: The date appears on the pictures.

Mr. Keating: We have no objection.

Mr. Jones: Then I offer in evidence a photograph of the steamship "Galileo", taken on the 17th day of August, 1927, by W. L. Drummond, photographer, this photograph being of the lower between decks.

Mr. Keating: Well, that we don't know.

Mr. Jones: Well, I will establish that in a moment.

The Court: You can ask him about that right now.

Q. Do you know what that photograph represents?

A. This photograph was made under the direction of Mr. Bagger, I don't know just which part of the ship, it is one of the between decks.

Mr. Jones: I will call Mr. Bagger in a moment and identify them.

It is agreed that the photographs may be offered in evidence after being identified by Mr. Bagger. There are six photographs.

(Witness withdrawn.)

[fol. 94] WILLIAM R. BAGGER, being duly sworn and examined as a witness for the libelant, testifies as follows:

Direct examination.

By Mr. Jones:

Q. Mr. Bagger, I show you a photograph which was taken by Mr. Drummond on the 17th of August, 1927, and ask you what that photograph represents?

A. That photograph is a view of the lower between deck of the steamship "Galileo" between the No. 2 and No. 3 hatches looking toward the port side of the vessel.

Mr. Jones: This has been marked Exhibit 1 in the United States District Court for the Southern District of New York, November 6, 1929.

Q. Looking at Exhibit 1, Mr. Bagger, I direct your attention to——

Mr. Keating: What is that you are looking at, Mr. Bagger?

The Witness: The original sketch.

Mr. Jones: I will ask you about that later. Don't bother with it now.

Q. I direct your attention to something that appears on the photograph where I now have my finger, and ask you to tell me what that is?

A. That is a piece of sill that extended athwartship in this compartment, and adjacent to it is remnants of both coal and cargo taken.

Q. Now, will you mark that sill—mark it in ink as it is a photograph, your pencil won't show—mark it "Piece of sill"?

A. (Witness does so.)

[fol. 95] Q. You are a ship surveyor, Mr. Bagger?

A. Yes, sir.

Q. And have been for a number of years?

A. 14 years.

Q. From your knowledge of ships can you tell me whether or not that piece of sill was a part of a bulkhead that was originally constructed there?

A. I believe so.

Q. And state the grounds of your belief.

A. First off, it had been tommed off or sawed off from the stanchion shown in this photograph; furthermore, in line with the sill was a quantity of caked coal and grease that was banked off square on the forward end, indicating that there had been a bulkhead at that place.

Q. Now I show you a photograph and ask you whether that photograph was taken under your direction by Mr. Drummond or by Mr. Drummond's assistant on—what is the date on the photograph?

A. 17th of August, 1927.

Q. 17th of August, 1927?

A. It was.

Mr. Jones: I ask that it be marked in evidence.

(The photograph is marked Libelant's Exhibit 2 in evidence.)

Q. Now will you look at Exhibit 2 and describe to the Court what that is a photograph of?

A. That photograph is the same location as the previous photograph, except that it is looking toward the starboard

side of the vessel, and this shows in more detail and extent the caked coal and grease indicating the location of the bulkhead.

Q. Will you mark on the photograph the location of the [fol. 96] bulkhead as indicated by the caked coal and grease?

A. (Witness does so.)

Q. Now I show you a photograph which was taken on the 17th of August, 1927, by Mr. Drummond, and ask you to tell me what that photograph represents?

A. That is a view of the same compartment, looking aft on the port side forward of the said bulkhead, showing the banked piles of caked coal and grease.

Q. Does it show any part of the bulkhead itself?

A. It shows the self-same sill piece.

Q. Will you mark that, please?

A. (Witness does so.)

(The photograph is offered in evidence and marked Libelant's Exhibit 3 in evidence.)

Q. Now, looking at Exhibit 3, Mr. Bagger, there seems to be some wooden structure in the background of that picture. Tell me what that is, please.

A. The part on the left in the way of the hatch was a temporary grain feeder; the portion on the right containing a passageway was a bulkhead between the No. 3 lower between deck and the side bunkers.

Q. Now I show you another photograph which was taken on the 17th of August, 1927, and ask you what that photograph represents?

A. That represents the compartment containing the sill piece aforementioned, looking aft on the port side of the vessel, the camera having been stationed forward of the said bulkhead.

Mr. Jones: I ask that the photograph be marked in evidence.

[fol. 97] (Marked Libelant's Exhibit 4 in evidence.)

Q. Will you be good enough to mark the sill piece with ink on the photograph?

A. (Witness does so.)

Q. And what is the wooden structure that is in the background of this picture?

A. On the left side is a temporary grain feeder; on the right side is the wooden bulkhead separating this compartment from the said bunkers.

Q. Now I show you another photograph, which is apparently taken on the "Galileo" on the 13th of August, 1927, and ask you what that one represents?

A. That represents the same compartment and the camera has been placed on the port side of the vessel looking about 45 degrees forward, and shows the caked coal and grease, immediately aft of the position of the bulkhead, as identified by the sill piece.

Mr. Jones: I ask that it be marked in evidence.

(Marked Libelant's Exhibit 5 in evidence.)

Q. I show you another photograph and ask you what that photograph represents.

A. This is a photograph taken with the camera, located at the port forward corner of No. 2 hatch looking down into the vessel.

Q. The photograph was apparently taken on the 13th of August, 1927, is that correct? A. Yes, on the date there.

Mr. Jones: I offer it in evidence and ask that it be marked.

[fol. 98] (It is marked Libelant's Exhibit 6 in evidence.)

Q. I show you another photograph and ask you what that photograph represents?

A. That photograph is a view of the upper between deck compartment between No. 2 and No. 3 hatches, looking aft, the camera having been placed at the port after corner of No. 2 hatch.

Mr. Jones: I ask that the photograph be marked in evidence.

(Marked Libelant's Exhibit 7 in evidence.)

Q. There is a light background in that photograph. Will you tell me what that background is—Libelant's Exhibit 7?

A. That is simply the light that came down through the No. 3 hatchway.

Q. And what was back there, do you remember?

A. There was a wooden bulkhead at the sides with passageways leading from the No. 3 compartment into the side bunkers.

Q. Now, there appear to be a number of pieces of wood where I put my finger. Can you tell me what those pieces of wood were?

A. That is a portion of a wooden bulkhead that was in place between the No. 2 and No. 3 hatches in this upper between deck.

Q. Will you take your pen and mark that, "Remains of wood bulkhead"?

A. (Witness does so.)

Q. And I show you another photograph which was taken on the 13th of August, 1927, and ask you what this photograph represents?

[fol. 99] A. That is a photograph of the caked coal and grease in the No. 3 lower between deck with the camera having been placed forward of the bulkhead identified by the remaining sill piece and further showing the square banked edge of the coal and grease.

Mr. Jones: I ask that it be marked in evidence.

(Marked Libelant's Exhibt 8 of this date.)

Q. These photographs were all taken after the "Galileo" was raised by Merritt & Chapman, weren't they?

A. Yes, sir.

Q. Now I show you a group of photographs, consisting of one, two, three, four, five, six and seven views, and ask if those photographs were taken under your supervision on the 13th of August, 1927?

A. Yes, sir.

Mr. Jones: I ask that the group be marked in evidence as one exhibit.

(Marked Libelant's Exhibit 9 in evidence.)

Mr. Keating: I would like to have an opportunity to order a set of those photographs, your Honor.

Mr. Jones: I will be glad to supply you with a set.

Mr. Keating: Thank you.

Q. Now, so that the record may be clear, will you take Exhibit No. 9 and describe what each of the photographs

[fol. 100] represents, saying "The first view represents" such and such, and so on, so the record will be clear as to what they show?

A. The first view is a view from the bridge looking forward. The second view is a view of the No. 2 hatchway, taken from the bridge. The No. 3 is a view of the fore deck, taken from forward of No. 1 hatch. No. 4 is a view of the after deck taken from the stern. No. 5 is a view of the engine and boiler room casings on this vessel. No. 6 is a view of the after deck looking aft. No. 7 is a view of one of the holds which I can't definitely identify—looking down into the hatchway.

Q. Now, Mr. Bagger, at my request did you make a sketch of the arrangement of the between decks of the steamship "Galileo"?

A. I did.

Q. Did you make a sketch indicating the position of these wooden bulkheads which you have pointed to in the various photographs which I have shown you?

A. I did.

Q. Now, have you your sketches in your pocket?

A. Yes (producing same).

Q. You have handed to me three sheets of paper. I show you one sheet of paper and ask you what that sheet of paper is?

A. That is a profile plan of the steamer "Galileo" showing the portion of the vessel in the way of the No. 2 and No. 3 hatches, from the keel to the weather deck.

Q. Is it drawn to scale?

A. Approximately.

Q. Do the measurements appear on the sketch?

A. No, the measurements do not, but frame spacing is indicated.

Q. What do you mean by "frame spacing"?

A. The fore and aft distance between the frames.

Q. And the frames are the ribs of the ship?

A. Yes, sir.

[fol. 101] Q. And what is the distance between those frames?

A. 27½ inches.

Q. Did you measure that?

A. Yes, sir.

Q. You have indicated, you say, the frame space there?
A. Yes, sir.
Q. Where is it indicated?
A. Toward the lower between deck, by the figures 5, 15, 20 and 25.

Mr. Jones: I offer the sketch in evidence.

(Marked Libelant's Exhibit 10 in evidence.)

Mr. Keating: I object to this on the ground that it purports to show more than the witness has stated it does; it has statements in here about coal and cargo and various things of that kind.
Mr. Jones: I will examine him further on that.

Q. Mr. Bagger, you have the word coal written on that statement; what did you intend to indicate by that?
A. That coal had been carried in that compartment.
Q. Was it quite obvious to you from what you saw that the coal had been carried in that compartment?
A. Yes, the photographs substantiate that, by the caked coal and grease.
Q. And you have "cargo" written on there?
A. That means that cargo has been stowed in those spaces.
Q. Was it obvious from your examination that cargo had been stowed in those spaces?
A. I can't say that exactly; it was more obvious where coal had been, but where coal was not, it was assumed that cargo had been there.
[fol. 102] Q. Then you have a ventilator appearing on the sketch?
A. Yes, sir.
Q. Did you see that ventilator there?
A. Yes, sir.

Mr. Jones: I offer the sketch in evidence, if your Honor please.
Mr. Keating: I make the same objection; the plan is obviously inaccurate.
The Court: Objection sustained as to the designation of coal and cargo; that is his inference, and I will allow the sketch in evidence, with the exception of those two words.

(Marked Libelant's Exhibit 11 of this date.)

Q. I show you another sketch and ask you if you made that sketch?

A. I did.

Q. Will you tell us what that sketch shows?

A. That is a deck plan of the lower between deck and shows the locations of the No. 2 hatch, the No. 3 hatch, the grain feeder, the wooden bulkhead, the ventilators and the passageways of this vessel.

Q. You made this up yourself?

A. Yes, sir.

Q. The measurements were taken by yourself?

A. Yes, sir.

(The sketch is offered in evidence.)

(Marked Libelant's Exhibit 12 of this date.)

Mr. Keating: May I ask this witness a question?

The Court: Yes.

[fol. 103] By Mr. Keating:

Q. Looking at Exhibit No. 12, Mr. Bagger, you have a place marked on here No. 3 hatch?

A. Yes, sir.

Q. Now, where is this No. 3 hatch, is that on the main deck?

A. This is the plan of the lower between deck, the lowest deck.

Q. Looking down into the lower hold?

A. Yes, sir.

Q. It doesn't purport to show anything above that?

A. No, sir. It is really a birds-eye view of the lowest between deck.

By Mr. Jones:

Q. This place is as you look on the deck of the lower between decks?

A. Yes, sir.

Q. What would be underneath this deck?

A. It would be the lower hold.

Q. And above it what?

A. The upper between deck.

Q. And then the shelter deck?

A. The weather deck.

Q. Now, refer to this rectangle which is marked No. 3 hatch. Will you described to the Court just how that was arranged?

A. The No. 3 hatch straddled the steel bulkhead that was in the lower hold, and this steel bulkhead extended up through the lower between deck compartment in the way of the hatch, only at the sides, the bulkhead was completed with wood in which there were passageways just forward of the aforementioned steel bulkhead and in way of the lower compartment there was a grain feeder.

Q. And that is for the purpose of permitting grain to run [fol. 104] down from above into the ship's hold?

A. Yes, sir.

Q. Now look at Exhibit No. 3 and show to the Court whether or not the grain feeder and the bulkhead appear on that photograph, and show that the plan which I believe is Exhibit No. 11, which you have in your hand—shows what is shown on the photograph?

A. If your Honor please, this photograph was taken from a position about here (indicating), marked with the letter A in pencil on Exhibit 11. Looking in that direction indicated by an arrow. If your Honor please, this is the sill piece, indicating the presence of a wooden bulkhead—you point to the sill piece which you have marked "sill piece" on Exhibit 3—and then point on the plan to the line marked wood bulkhead, just forward of frame 20. This wooden structure in the way of the hatch is the grain feeder, which is so marked on the plan.

Q. Now will you mark this grain feeder on the photograph?

A. Yes sir (witness does so). This wooden bulkhead is the one shown in the photograph.

Q. You said this wooden bulkhead—mark that with a B, will you please? You say one shows on the photograph; will you mark it with a B on the photograph?

A. (Witness does so.)

Q. Now, what is this thing here that I now designate with my pencil?

A. That is a ventilator.

Q. Is that shown on your sketch?

A. It is, sir.

Q. Where is it marked on your sketch?

A. Marked "Ventilator."

Q. Will you mark it "Ventilator" on the photograph, put a letter C?

A. Ventilator C (witness does so).

[fol. 105] Q. Now, you have here figures 5, 10, 15 and 20; what are those figures?

A. They are the frame spaces forward of the steel bulkhead at the forward end of the fire room.

Q. Now, will you indicate on the photograph whether or not the frame spaces show?

A. The frame spaces would be indicated on the side here between the frames.

Q. Do the frames show on the side there?

A. Yes, sir, and also at the deck beams.

Q. Will you mark the frames by the letter F so the Court will know what you mean by the frame spaces?

A. Yes, sir.

(Witness does so.)

The Court: Also mark on the plan the location of this wooden bulkhead; he has described it, but he hasn't marked it.

(It is so marked.)

Q. You have the sill piece here with the words "sill piece". Will you put a D on the sill piece to indicate where the sill piece was?

A. (Witness does so.)

Q. And then will you put a letter D wherever the sill piece was on your sketch?

A. I am marking it sill piece.

Q. I show you a sketch and ask you whether or not you made that sketch?

A. I did.

Q. And what does that sketch show?

A. That is the deck plan of the upper between deck on the steamer "Galileo".

Mr. Keating: We call that the shelter deck, our people do.

The Witness: This is not the shelter deck, this is the upper between deck; this is not the weather deck.

[fol. 106] Mr. Keating: We call the lower one the shelter deck.

Mr. Jones: We might as well conform to their nomenclature; that would be the shelter deck.

The Witness: This is not the shelter deck, Mr. Jones, this is the first between deck.

By the Court:

Q. What do you mean by the shelter deck?

A. The shelter deck is the weather deck.

By Mr. Jones:

Q. Now, Mr. Bagger, I think there is a slight cross purpose between your nomenclature and Mr. Keating's, and I am only too glad to assist them in any way I can, so we will have no misunderstanding as to what we are talking about. As I take it, the ship's officers described the spaces between the weather deck and the deck first below as the shelter deck space?

Mr. Keating: That is right.

Mr. Jones: And the compartment between the deck forming the lower part of the shelter deck space and the deck below the between deck space.

Mr. Keating: That is right.

Mr. Jones: And the space between the deck below forming the bottom of the between deck space and the lower hold, the lower hold?

Mr. Keating: That is correct.

Mr. Jones: Now, the various spaces are called the shelter [fol. 107] deck, the lower deck space and the lower hold.

Now, let us get it straight. He calls the top of the shelter deck space the weather deck. Now, do you call it the weather deck or the shelter deck or what?

Mr. Keating: We call it the weather deck.

Mr. Jones: Now, the deck which forms the bottom of the weather deck space, what do you call it?

Mr. Keating: The shelter deck.

Mr. Jones: And the deck which forms the bottom of the between deck space, he calls that lower between deck; what do you call it?

Mr. Keating: The between deck.

Q. Now, Mr. Bagger, in describing the plan, endeavor to conform to the nomenclature which the ship's officers use in describing the plan.

Mr. Keating: Well, let me see it first.

Mr. Jones: I offer it in evidence.

(Marked Libelant's Exhibit 12 in evidence.)

The Court: I don't know that Mr. Keating meant to have it offered in evidence; I think he meant to have it marked for identification.

Mr. Keating: This is the first time I have had a chance to look at it.

The Court: It will save a great deal of the Court's time.

Mr. Keating: I object only to the designations of what [fol. 108] was in the spaces which he has marked coal and cargo.

Mr. Jones: Here is something in which I think I can aid you, but I am not sure.

The Court: This last exhibit is marked in evidence, with the exception of the designation of coal and cargo.

Mr. Keating: That is all right.

Mr. Jones: And you agree that I may offer it in evidence?

Mr. Keating: Yes. It doesn't purport to show accurately the ship.

Mr. Jones: No, it purports to show where the cargo and coal was. I offer in evidence what is called the storage plan.

(Marked Libelant's Exhibit 13 in evidence.)

Q. Now, have you finished your description of the plan which you have before you, Mr. Bagger?

A. No, I have not.

Q. Will you complete that description of Exhibit 12?

A. This is a deck plan of the shelter deck, that is, the first deck below the weather deck of the steamship "Galileo", in way of the No. 2 and No. 3 hatches, and shows the positions of the steel bulkhead and wood bulkhead and passageways in way of No. 3 hatch, the ventilators in this compartment and also the wooden bulkhead in way of the 24 frame just aft of the No. 2 hatch.

Q. You have some measurements here, 30 feet 5 inches; what did that mean?

A. That means the ventilator was that far aft from the bulkhead.

Q. And you have the figures 5, 15, 20 and 25.

A. That is frame spaces forward of the fire room steel bulkhead.

[fol. 109] Q. The fire room steel bulkhead would be where?

A. It would be on the right hand side indicated by zero.

Q. Mark that.

A. (Witness does so.)

Q. What was the distance between the frame spaces?

A. 27½ inches.

Q. Now, the figure 5 would indicate that there were 5 inches between the frame spaces there and zero?

A. Yes.

Q. Figure 10 would indicate there were 10 frame spaces between there and zero?

A. Yes, sir.

Q. And so on?

A. Yes, sir.

Q. Now, I show you Exhibit 13, which is a stowage plan of the ship and also Exhibit No. 10, which is the sketch which you drew, and I ask you to show to the Court where what Mr. Keating calls the shelter deck compartment was on Exhibit No. 13.

A. That is this portion here. (Indicating.) This is the shelter deck space up here. (Indicating the top portion of the stowage plan.)

Q. Now, you have a compartment on your sketch which I will ask you to mark with the letter A, which you call upper between decks coal.

A. (Witness does so.)

Q. Does that same compartment show on Exhibit 13?

A. Yes, sir.

Q. Will you mark it with the letter A?

A. (Witness does so.)

Q. And what is written on the No. 13?

A. "Coal".

Q. Now, you have a compartment which you call lower between decks, with the word "Coal"; does that show there on your sketch?

A. Yes, sir.

Q. Will you mark it with the letter B? Mark both with the letter B.

A. (Witness does so.)

[fol. 110] Q. And then forward of the space you have marked with B; what is there?

A. Cargo.

Q. Does it show on the stowage plan?

A. Yes, sir.

Q. Will you mark that with the letter C?

A. (Witness does so.)

Q. And mark it with the letter C on your plan?

A. (Witness does so.)

Q. Now, in the lower holds in which you show cargo, what shows on the stowage plan?

A. Red winter wheat.

Q. That is cargo, isn't it?

A. Yes, sir.

Q. And the same on the other side?

A. The other side.

Q. I mean, it says red winter wheat; underneath D and E is winter wheat also?

A. Yes, sir.

Q. Mark it D and E.

A. (Witness does so.)

Q. Make similar markings on your plan.

A. (Witness does so.)

Q. Mr. Bagger, look at Exhibit No. 7, and I point to something that appears on the photograph. Will you tell me what that thing is?

A. That is a ventilator.

Q. Will you mark it with some letter, please, so that we will know what it is?

A. The letter V?

Q. V is all right. Will you describe that to the Court, just what that is?

A. That is a ventilator from the weather deck leading into the shelter deck space just forward of the wooden bulkhead, marked thereon.

Q. Now, can you describe how this wooden bulkhead was constructed?

Mr. Keating: I object to that, your Honor, if he is going [fol. 111] to describe the construction from having looked at the burned sill.

The Court: No, that isn't what he looked at. He examined the burned bulkhead, I presume.

Mr. Keating: He has this marked "Remains of a wooden bulkhead".

The Court: This isn't the one he is to describe.

Q. You saw the remains of that bulkhead, didn't you?
A. Yes, sir.
Q. Will you describe what it consisted of?
A. It consisted of vertical——

By the Court:

Q. Now, just one moment. The question is what did the remains consist of?
A. Yes, sir.
Q. I want you to describe only what you yourself know. Did you see the original bulkhead?
A. No, sir, except in so far as the portion of it which was remaining.
Q. I want you to describe only what you saw.
A. The remains of this bulkhead consisted of a portion of vertical planking on the starboard side of the shelter deck space. This planking was placed vertically and was of size about 2 inch- by 10 inches by about 8 feet.
Q. You saw those?
A. Yes, sir.
Q. How many were there?
A. Approximately as many as it would take to go across the vessel, your Honor?
Q. Yes.
A. About 20.
Q. Was some of it burned?
A. No, they weren't, no, sir.
[fol. 112] Q. No sign of fire on any of them?
A. No, not on that bulkhead. Over the crevices between the vertical planking had been nailed strips or battens.
Q. Did you see that?
A. Yes, sir; and a portion of a curtain was still existent on the forward side.

By Mr. Jones:

Q. That all appears from the photograph, doesn't it?
A. Yes, sir.
Q. You observed that yourself?
A. Yes, I saw that, and in fact, I directed the photographing of it.

Mr. Jones: I don't want to be tedious, if your Honor please, but in order to avoid any criticism of Mr. Bagger's testimony, I am going over it in narrative form with him, just what he did observe.

The Court: All right; make it as short as you can.

Q. Now, Mr. Bagger, you went on board the "Galileo", as you have told us?

A. Yes, sir.

Q. Do you remember the date you went aboard?

A. I think it was August 12th, 13th and 17th, 1927.

Q. Where was the ship when you went aboard of her?

A. At Gravesend Bay.

Q. Was she afloat or sunk or what was her condition?

A. She was lying afloat with a list of about 25 degrees.

Q. Now, will you describe the vessel to us?

A. May I refer to my original notes on this?

Q. Yes.

A. This vessel is of the shelter deck type with 3 steel [fol. 113] decks. Her side or shell frames are spaced 27 inches—I would like to remark that I said previously 27½ inches—I would like to make that correction—27 inches in the holds, lower between deck and upper between deck or forward deck spaces, but the deck beams for the two lower decks are on alternate frames, while the weather deck beams are on every frame.

Q. What is the construction of the bulkhead?

A. There is a bulkhead forward of the boiler room.

Q. What deck are you talking about now?

A. I am not talking about any particular decks.

Q. You mean all the decks?

A. Yes, sir. The bulkhead at the forward end of the fire room is of steel and extends from the tank top to the upper between deck.

Q. What do you mean by the tank top?

A. There were double bottom tanks—to the upper between decks.

Q. That is what Mr. Keating calls the shelter deck space.

A. Yes, sir. There is a steel bulkhead 12 feet forward of this which extends up to the weather deck, but in the lower and upper between deck spaces, that is, in the between deck and shelter deck spaces, it is of steel only in the hatchways, while at the sides or wings of these compart-

ments it is of wood covered with burlap and fitted with passageways. In the lower between deck compartment this steel bulkhead serves as the after part of the grain feeder for No. 3 hatch extending 5 feet fore and aft by the breadth of the hatch, and from the lower between deck to the upper between deck; there is a wooden bulkhead between the No. 2 and 3 lower holds. In the lower between deck there has [fol. 114] evidently been a wooden bulkhead at the 21 frame, forward of the boiler room bulkhead, as on the port side of the deck, there is a piece of steel remaining which is sawed off from a stanchion and there was a quantity of caked coal and grease at this space which indicated the presence of a bulkhead, as the two piles were banked up square on the forward edges. The upper between deck space, that is, the shelter deck space, had a light wooden bulkhead about 7 feet aft of the aft end of No. 2 hatch and the starboard portion of that is still remaining.

Q. At the time of your visit?

A. Yes, sir, and is photographs. That describes the vessel.

Mr. Keating: Now may I see the notes from which this gentleman read?

The Court: Yes, certainly.

(They are handed to counsel.)

Q. I think I have covered this, but look at Exhibit 4, and observing what I now point my pencil at, can you tell me what that is?

A. I stated before that that is a wooden bulkhead between the No. 3 lower between deck and the side bunkers with the passageways.

Q. Will you mark that with the letter B on that photograph?

A. We have had that letter before, Mr. Jones.

Q. Not on that particular photograph.

A. (Witness does so.)

Q. Now you have marked that with the letter B on Exhibit 4 indicating the bulkhead which is at the after end of the No. 3 lower between decks?

A. On the port side of the vessel.

Q. You observed that bulkhead, did you?

A. Yes, sir.

[fol. 115] Q. Will you describe its construction?

A. That was built up of horizontal planks and over that had been draped a curtain of burlap.

By the Court:

Q. You say "had been". Was the curtain there when you saw it?

A. Yes, sir, a portion of it. A portion of the burlap was still in place.

Cross-examination.

By Mr. Keating:

Mr. Jones: I would like for you to offer this whole thing in evidence as you have it now.

Mr. Keating: I am willing to have what he refreshed his recollection with.

Q. Mr. Bagger, with respect to this sill that you have been describing with coal caked on one side of it, and grease on the other——

A. No, sir, I didn't say that.

Q. Will you please describe how that was?

A. Aft of the sill piece remaining and also on the starboard side of this compartment, where there was no sill piece remaining, we found banked piles of caked coal and grease, the coal and grease being mixed together.

Q. Are you able to say which side of that bulkhead which you examined, the sill, the fire started?

A. No, sir.

Q. Now, this survey that you went down with—this report of yours was signed by Mr. Alfred E. Jordan and by a third gentleman, Captain McLennan?

A. Yes.

Q. Now, in this report you stated: "It is obviously impossible to ascertain from an inspection at this time [fol. 116] whether the fire started forward or aft of the wooden bulkhead at this place, the fire has been hottest forward of the bulkhead, but this may be due to the nature of the cargo. We note from the extract of the vessel's logbook dated at 4:35 P. M., August 28th, 1928, 'Smoke was observed coming from the forward starboard ventilator at No. 3 hold'. This ventilator leads to the between deck space described above and which contained coal. Our

investigation indicated that the fire could have had its origin in this space, but it is impossible for anyone to state definitely, from the physical evidence now available, where the fire originated. Nothing found by us, however, leads us to doubt the accuracy of the statement which we have quoted from the ship's log." Does that represent your views today?

A. Yes, sir.

Q. This is your copy of it?

A. Yes, sir, my copy.

Q. How many of these were there, Mr. Bagger? (Referring to the sketches.)

A. Three.

Q. Now, Mr. Bagger, in looking at Exhibits 10 and 12, do I understand that those positions of the bulkheads and the distances between them are absolutely drawn to scale?

A. Substantially so, yes, sir.

Q. Now, "substantially" won't do. Are they drawn to scale or not?

A. Yes, I would say they were.

Q. Well, what is the difference between "they were" and "substantially"?

A. Well, simply that a draftsman drawing mostly to scale is correct to a fraction of an inch, I will say that is correct say within an inch.

Q. You didn't take this space marked A and this space [fol. 117] marked B on Exhibit 10 from the cargo plan?

A. The cargo plan?

Q. Yes.

A. No, sir.

Q. You are sure that those spaces that you have and marked A and B on Exhibit 12, is the way that ship looked when you saw it?

A. Yes, sir, I will say that the cargo plan wouldn't give any indication at all of the size of the various compartments.

By the Court:

Q. Did you make the measurements yourself?

A. Yes, sir, and the frame spaces, and took the number of frames, and ascertained the numbers of the compartments.

Q. Aside from measuring the frame spaces what else did you measure?

A. Well, the height of the compartment.

Q. Did you measure that?

A. Yes, sir.

Q. What did you have, a tape measure?

A. No, a rule.

Q. What else did you measure?

A. Well, that is the customary way of measuring those compartments; the frames are equally spaced on the vessel. You simply ascertain the distance between them and take the number of frame spaces, that gives you the length.

Q. That doesn't give you the distance with relation to the width of the vessel?

A. No; I rather think I took them.

The Court: I think that covers your point. It isn't made to scale because he didn't measure the width at all.

Mr. Keating: I object, for they are absolutely wrong.

[fol. 118] The Court: He only measured the frame spaces and the heights, he didn't measure the width at all.

Mr. Jones: The width is immaterial. I don't think that question is going to come up at all, but this other question is quite a different matter. This witness did measure the fore and aft distances, the frame spaces with a rule, and counted them, and they are equally spaced, so with that measurement he had an accurate measurement of that compartment as to how long it was, and when I get an opportunity to question him again I will question him on that point, so there won't be any question about it.

By Mr. Keating:

Q. Now, Mr. Bagger, will you please look at this? Here is the upper between decks, that is the shelter deck?

A. Yes, sir.

Q. Here is the wooden bulkhead there?

A. Yes, sir.

Q. Here is the lower between deck. Now, you have got the wooden bulkhead in this position, showing the difference.

A. It is two different bulkheads.

Q. And what about the position of this bulkhead there right on the hold?

A. That is on the lower hold. I haven't that indicated on either of the deck plans, that is the reason I didn't put it on, but if you will notice this wooden bulkhead on Exhibit 12 is indicated on Exhibit 10 by this line marked wooden bulkhead showing the same distance on the No. 2 hatch. [fol. 119] This bulkhead here is Exhibit 11, showing the wooden bulkhead in the lower between deck space is indicated on Exhibit 10 by the word "bulkhead" just aft of the letter C. Those two wooden bulkheads were not in line with each other, nor were they in line with the wood bulkhead in the lower hold; they were stepped.

Mr. Keating: No further questions from me to this witness.

Redirect examination.

By Mr. Jones:

Q. Mr. Keating has referred to your report and read some paragraphs from it. Have you got that report there?

A. Yes, sir.

Mr. Jones: I offer the report in evidence, if your Honor please.

Mr. Keating: I object to it, your Honor.

The Court: It only would be proper if it modified or explained some part of what this witness has already stated. Unless you point out to me that it does so modify it, I will exclude it.

Mr. Jones: My friend has read from it, and I would like to have the whole report in evidence.

The Court: It depends on what it contains.

Mr. Jones: It doesn't modify his statement at all.

The Court: Does it explain it or have any relation to what he read?

Mr. Jones: It is all part of one statement, if your Honor [fol. 120] please. He has offered one part and I would like to offer the whole of it.

The Court: Unless you show me that it has some relation to what he has read into the record, I will exclude it.

Mr. Jones: He has read only a part of it, and I would like the preceding paragraphs to go in also. I will question the witness about it.

The Court: Well, you read them.

Mr. Jones: I don't want to take up any more time—I can question the witness about that and get the information that way instead of putting the statement in.

The Court: That is a naive suggestion—you can question him and if I think it relates to what has been put in I will let you put in, but if it doesn't relate to it, I won't have it in.

Mr. Jones: I will question him as to what he further said about that.

The Court: Which was the part he read?

Mr. Jones: He read the concluding paragraph.

The Court: I will have it marked in evidence with exception to the respondent—Libelant's Exhibit 14 of this date.

Q. Now, Mr. Bagger, you were questioned about the measurements which you made in the steamship "Galileo". Are you in a position to state whether or not the measurements you made you can testify to accurately as to the position of the wood bulkhead in what Mr. Keating calls the shelter deck space?

A. Those sketches are accurate within an inch.

[fol. 121] Q. You are positive of that?

A. Yes, sir.

Q. And you made those measurements, as I take it, by measuring the frame space and then counting the number of frame spaces to ascertain the position of the bulkhead?

A. Yes, sir.

Q. And how did you ascertain the position of the bulkhead? Did you see it with your own eyes?

A. Yes, sir.

Q. The position of the sill?

A. Yes, sir.

Q. And as shown in the photograph?

A. Yes, sir.

Q. And in the shelter deck space you saw the reverse of a portion of the bulkhead itself?

A. Yes, sir.

Q. And how did you ascertain the position of the bulkhead in what you call the lower between deck?

A. From the sill place and the banked piles of coal and grease.

Q. I want you to see some of these photographs and show to the Court exactly how you ascertained the position of the bulkheads.

The Court: If it is repetition, you needn't go over it with me.

Mr. Jones: I think it is an accurate way of representing the position.

The Court: I know what he did. If you want to amplify it, you can go into it, but if not, it is repetition.

Mr. Jones: I judge from a few remarks that your Honor made that your Honor seemed to have some doubt as to the accuracy of his measurements, and I want to clear that up, for I think they are absolutely accurate.

The Court: I understand exactly what he did.

[fol. 122] Q. You referred to frame spaces. Will you point to Exhibit 3 and show to the Court what a frame space is?

The Court: He has already done that.

Q. Do you know the spaces, that is, the distances between the frames on various ships are the same?

A. Yes, sir.

Q. How do you know that?

A. I tried it in a number of places.

Q. Checked it up yourself?

A. Yes, sir. The reason I did that is that frequently the frame spaces may be 27½ inches, and I wanted to be sure it was 27 inches, and I tried it in a number of places and ascertained it was 27 throughout.

Q. How many did you try?

A. 3 or 4, I should say, Mr. Jones; I don't recollect.

The Court: Do you dispute anything that this witness has said except perhaps the sketch?

Mr. Keating: No.

The Court: Then I don't think it will be necessary at this time to put on any other surveyors unless they can testify to more than Mr. Bagger has testified to.

Mr. Jones: There may be one or two points, if your Honor will bear with me, during the lunch hour, when I can go over it with them and then I can put them on, and I have some other experts that I want to put on.

The Court: I suggest that there doesn't seem to be much dispute as to what Mr. Bagger has said.

Mr. Jones: There are one or two other facts that I want [fol. 123] to bring out, if your Honor please.

The Court: Do the other surveyors know it and not Mr. Bagger?

Mr. Jones: Well, I don't know. They may wholly disagree with Mr. Bagger, and then over the lunch hour——

The Court: Then you want a recess?

Mr. Jones: Yes, your Honor, I may shorten it up a bit.

The Court: There is no use in making repetition.

Mr. Jones: Now, if your Honor please, I have copies of three wireless messages which were furnished me by my opponent, sent by the master of this ship to his owners here in New York, which I would like to offer in evidence.

Mr. Keating: We have no objection, but if he is going to put in a file of radio messages, I suggest that they ought all to go in.

Mr. Jones: I have no objection to their all going in. Whether we have a complete file or not, I don't know. Have you got a complete file of the radio messages——

The Court: Suppose we leave it this way: We will consider as marked in evidence all of the radio messages that either side wants put in.

Mr. Jones: It is quite agreeable.

The Court: And you can pick out anything you like.

(The radio messages are marked Libelant's Exhibit 15 in evidence.)

[fol. 124] The Court: Now, there may be lots of matters like radio messages and other things that we may save time on; if you will let me see what you want to put in, I think we can get on faster.

Mr. Jones: Mr. Keating has produced some plans and this deck plan I will probably offer in evidence, but this one you say should be so carefully treated, I suggest that we get it photographed and treat it brutally and return you your original. If Mr. Keating will show me what documents he wants put in——

The Court: He might do that, some of them anyway.

Recess until 2:15 P. M.

New York, November 6, 1929.

Met pursuant to adjournment at 2:15 P. M.

WILLIAM R. BAGGER resumed the stand.

By Mr. Jones:

Mr. Jones: Your Honor suggested that I not call my other surveyors to simply duplicate the testimony by Mr. Bagger; I am following your Honor's suggestion and putting one or two questions to him and then I will consider calling one or two surveyors.

Q. Mr. Bagger, you are a marine surveyor?
A. Yes, sir.
[fol. 125] Q. And you are familiar with ships?
A. Yes, sir.
Q. Are you in a position to say whether or not a bulkhead which is not watertight is also not airtight?
A. Yes, sir.
Q. Is a bulkhead which is not watertight also not airtight?
A. Yes, sir.
Q. Do you mean it is not airtight?
A. I mean if a bulkhead is not watertight it is not airtight.

No cross examination.

Mr. Jones: I offer in evidence a report made by the chief engineer surveyor for Lloyds Register of British and Foreign Shipping on the spontaneous combustion of coal, dated London, May, 1912.

(Marked Libelant's Exhibit 16.)

Mr. Jones: I offer in evidence the official instruction to surveyors issued by the British Board of Trade, Marine Department, December, 1922. That is published by His Majesty's stationers' office, to be purchased through any booksellers, etc., 1923.

Mr. Keating: I wish to reserve an objection to that.
The Court: All right.

Mr. Jones: You don't question that this is an original document, do you?

Mr. Keating: I want to check it up. My recollection is that this covers keels laid after 1923.

(It is marked Libelant's Exhibit 17 for Identification.)

[fol. 126] Mr. Jones: I offer in evidence a letter written by W. L. Magregor of the Board of Trade, dated the 24th of December, 1919. Have you any objection to that?

Mr. Keating: I haven't even seen that.

Mr. Jones: I showed it to you just now and asked if you had any objection to it. (Showing it to counsel.)

Mr. Keating: Is this the letter here?

Mr. Jones: This is the letter.

Mr. Keating: I object to this, your Honor; this is apparently a letter by Mr. W. L. Magregor; who he is, I don't know, your Honor——

The Court: It is competent, is it?

Mr. Keating: No.

Mr. Jones: I can prove it by my own experts, if your Honor please. I was simply trying to save time.

Horace C. Porter, being duly sworn and examined as a witness for the libelant, testifies:

Direct examination.

By Mr. Jones:

Q. Dr. Porter, what is your profession?

A. Consulting chemical engineer.

Q. And will you give the Court a brief account of your education?

A. I was educated at the University of Illinois, graduating there in 1900 in chemistry, and then took post-graduate work at Harvard University in chemistry, taking the degree of Doctor of Philosophy in 1903.

Q. In chemistry?

A. In chemistry.

Q. Then after you were graduated from Harvard, will [fol. 127] you give the Court an account of your experience in after life; tell the Court what you specially have become?

A. I spent 4 years in industrial laboratories of industrial

manufacturing concerns, and then entered the employ of the United States Bureau of Mines at their experimental station in Pittsburgh, working particularly on coal investigations, including work on distillation of coal and by-products, and also work on the storage of coal and spontaneous combustion. This involved a good many investigations of actual industrial cases of spontaneous hearing in coal piles and ships' bunkers, and after leaving the employ of the Government in 1915 I entered the employ of another industrial concern, The Koppers Company of Pittsburgh, builders and operators of by-products, coke oven plants; while in this connection I was called upon to look after matters connected with coal, the purchase of coal and the storage of coal, and a great deal of my work had to do with coal and its handling and treatment in their plants. At the time of the outbreak of the war I entered as a captain in the Ordnance Department with work in Washington on chemical supplies, the production of chemical supplies or explosives, and after the war I entered into consulting practice, specializing in fuel, in which I have been since that time.

Q. During your experience have you had occasion to investigate and form opinions as to the safe and unsafe methods of stowing coal?

A. Yes, I have.

Q. Are you the author of any pamphlets or publications respecting coal and spontaneous combustion in coal and methods of storage?

A. Yes, sir.

[fol. 128] Q. What pamphlets are they or other publications?

A. I published a technical paper, so-called, of the Bureau of Mines, No. 16, on Deterioration and Spontaneous Heating of Coal.

Q. Is that issued as an official publication of the United States Government?

A. Yes. And an article of mine on Spontaneous Heating was published in the proceedings of the International Congress of Applied Chemistry in 1912, and another bulletin of the Bureau of Mines, No. 132, was on the subject of Deterioration of Coal in Storage, bringing in matters of proper storage of coal and the losses in heating value. That is all on the subject of storage and spontaneous heating.

Q. Now, Dr. Porter, I have shown to you the interrogatories and answers, together with the annexed exhibits in this case, and I will submit to you the following question and ask you whether or not on the facts which I shall give you in this question you are able to form an opinion as to the comparative causes of a fire which broke out on the steamship "Galileo". Please assume the following facts: The steamship "Galileo" was a British cargo steamer operating between ports in the United Kingdom of Great Britain and Ireland and the United States. She was sunk on fire in New York Harbor at 4:50 A. M., August 30, 1926——

The Court: Is your other expert in the room now?
Mr. Jones: Yes, sir.
The Court: He ought to take a seat where he can hear.
Mr. Jones: Professor, will you sit here please?

[fol. 129] Q. (Continuing.) Her master reports on September 1, 1926, in a letter addressed to Messrs. Ellerman's Wilson Line, Inc., Hull, England, as follows:

"Dear Sirs: I have to confirm cable sent by the New York Office Company, advising 'Galileo' was sunk on fire in New York Harbor at 4:50 a. m. Monday, August 30th. The circumstances are as follows:

"We sailed from New York at 10:30 A. M. August 28th, and proceeded to Gravesend Bay and loaded eight tons of gunpowder, sailing from there at 12:50 p. m. At 4:40 p. m. when off Fire Island Light Vessel, smoke was observed coming from No. 3 Hold Ventilator, starboard side, and smelt as though wood was burning. As No. 3 'tween Deck and Shelter Deck was full of bunker coal shifted in New York during the week on top of about 160 tons of coal left from previous voyage, I came to the conclusion that spontaneous combustion had set fire to the bunkers and bulkhead between No. 2 and 3 Tween Deck on the spar ceiling. We took No. 2 hatches off and found no smell of fire in No. 2 Tween Deck, which contained spelter and about 8,000 boxes of lard in the after part. I decided to return to New York, and at 5:19 p. m. turned the ship around. I blocked off all ventilation to exclude air, concluding this best thing to do until our arrival back in New York when assistance could be obtained to shift coal to get at the seat of fire,

which meant shifting from 250 to 300 tons. I sent a wireless to Wilsonlyn New York 'Bunkers in No. 3 tween-deck on fire returning New York arriving Ambrose light vessel [fol. 130] 8:30 suggest bunkers discharged or shifted to No. 2 shelter deck' which was empty. After taking on Pilot on Board we anchored in Gravesend Bay at 1:10 p. m. I sent a wireless to Wilsonlyn New York 'Anchored Gravesend Bay suggest sending gang off to discharge bunkers now of fire'. The crew commenced getting up the 86 cases of gunpowder on deck; handy to discharge or throw overboard in case of emergency.

"At 2:00 a. m. received wireless message 'Labor will arrive as soon as possible.' At 10:20 coal laborers and Mr. Sanderson with tug Powder Lighter arrived; Gunpowder was discharged and we got under way, and proceeded up the river and anchored off Weehawken at 10:40 (about one mile above our Hoboken pier); meantime, laborers removing bunkers from No. 3 hold into side bunkers and on deck. At 5:30 laborers ceased working coal on account of smoke. As No. 2 Tween Deck by this time was getting hot, we commenced pumping water into No. 3 Shelter Deck from ship's bow. By this time laborers had shifted about 35 tons bunkers. At 6:40 sent wireless message for Fire Boat. At 7:20 Fire Boat alongside commenced pumping water into No. 2 Tween Deck, from which smoke was now issuing when hatches were taken off. At 8:00 p. m. crew working coal from No. 3 shelter deck. At 11:00 p. m. crew compelled to stop working the coal as dense smoke was by this time issuing from No. 3 Tween Deck. At 11:10 Fireman got hoses down No. 3 Tween Deck and commenced pumping water into ship. By this time ship had a 21° list to starboard and Chief of Fire Boat informed me that fire was growing and sent wireless to send another Fire Boat, also that it was advisable to beach the ship, as he was going to put two [fol. 131] six ft. pipes in the ship. At 11:55 I hove up anchor and beached the ship which lay about one-quarter mile away on the Jersey side of the river and was composed of soft mud. We took soundings which showed 17 ft. over the stem, 28 feet amidships and 40 ft. over the stern. By this time the ship had a 25° list.

"About 12:45 a. m. August 30th another Fire Boat came alongside and commenced pumping water into No. 2 and 3

Tween Decks. By this time dense columns of smoke were issuing from No. 2 and 3 Tween Decks, also flames. At 2:00 a. m. sent wireless message for two tugs to assist keeping ship on bank as by this time the first of the flood tide had commenced and the ship was still listing and slewing broadside on to the beach and inclined to slip off. Two salvage steamers arrived about 2:30 a. m. and took up position on port bow and port quarter and held ship broadside on to beach. Ship had now a list of 21°, having come up 5°. About 4 a. m. the ship commenced listing heavy to 26°. At 4:15 list 30° and 4:30 list 35°. Up to this time I did not think it possible that the ship would turn over on her beam ends, when suddenly she keeled over until the water flowed over the hatch combings and she laid on her beam ends at 4:50 and was submerged about 32 ft. starboard side under water heading about S. W.

"The crew saved most of their effects, but the Officers, Engineers and myself lost nearly everything as we did not realize, as I have stated before, that the ship would sink.

"The crew are leaving here tomorrow except the Chief Engineer, Chief Officer and myself, the W/U operator being transferred to another ship here.

[fol. 132] "I very much regret having to report this catastrophe, but I did my best under the circumstances for everyone concerned.

"I am dear sirs,

Yours obediently, —— ——, Master."

Entries on the ship's logbook, August 28th and 30th, as appear in the ship's protest, are as follows:

"Galileo"

"1926.

Aug. 28. At 10:17 A. M. this vessel left her berth at the Ellerman-Wilson Line Pier, Hoboken, with grain and a general cargo, for Hull, Newcastle and Antwerp. At 11:52 A. M., she anchored in Gravesend Bay for the purpose of loading powder. At 12:50 P. M. the anchor was weighed and the vessel proceeded to sea. There was a light to moderate wind with a slight sea, and the weather was fine and clear. At 4:35 P. M.,

smoke was observed coming from the forward starboard ventilator at No. 3 hold, and it was decided to put back to Gravesend Bay. At 8:30 P. M. the smoke increased in volume from the No. 3 starboard ventilator and the ventilator cowls were covered up. At 10:10 P. M. the vessel anchored in Gravesend Bay and a message was sent out requesting the vessel's agents in New York to arrange for laborers to [fol. 133] come and move bunker coal. The powder was then moved from the magazine to the upper deck.

Aug. 29. At 1 A. M. a wireless message was sent out for a fireboat to stand by. At 3 A. M. a fireboat was alongside, but was informed that assistance was not required. During the morning there was a fresh to strong W. N. W. wind and the weather was fine and clear. At 10:20 A. M. laborers came on board and commenced discharging powder from the upper deck to a lighter. At 10:55 A. M. the discharge of powder was completed and the anchor was weighed and the vessel proceeded to Weehawken with a pilot aboard. At noon the laborers commenced moving coal from No. 3 hold to side pockets. At 12:40 P. M. the vessel anchored below 34th Street Ferry, Weehawken. At 5:30 P. M. the laborers ceased working on account of smoke; they had previously been working at intervals. At 5:32 P. M. commenced pumping water into No. 3 hold from the ship's hose. At 6:40 P. M. sent a wireless for a fireboat and the ship's hose was pumping water into No. 2 'tween deck. At 7:20 P. M. the fire boat 'James Duane' came alongside and commenced pumping water into No. 2 'tween deck. Twenty-five minutes later the ship commenced to list to starboard and at 8 P. M. the crew commenced working coal out of No. 3 hold. At 11:30 P. M. the vessel had a [fol. 134] list of 20° to starboard. At 11:55 P. M. the anchor was weighed and the vessel was beached on the West Shore, near 34th

Street Ferry. The vessel then had a list of 25° to starboard.

Aug. 30. The fireboat continued to pump water into Nos. 2 & 3 holds. At 2:30 A. M. the salvage steamer 'Chapman Brothers' and the tug 'Alert' came alongside to assist in holding the ship on the beach, and at 2:45 A. M. a second fireboat arrived and commenced pumping water immediately. At 4 A. M. the vessel commenced to list further and at 4:50 A. M. she turned over on her beam ends, broadside on the beach."

The respondent, the owner of the "Galileo", admits the following facts in its answers to interrogatories annexed to the libel:

"Third interrogatory: (a) When was each lot of bunker coal in No. 3 'tween-deck put on board the 'Galileo'?

"Answer. One lot of the coal in No. 3 'tween decks was put aboard the 'Galileo' on or about June 30, 1926; the other lot was placed aboard on or about August 26, 1926.

"(b) What are the names and addresses of the persons who supplied and loaded that coal and how much did each supply?

"Answer. All coal was supplied by the Morrisdale Coal Company, 17 Battery Place, New York City.

[fol. 135] "(c) What kinds of coal were in No. 3 'tween-deck and what are their technical and trade designations or classifications?

"Answer. All coal in No. 3 'tween decks is believed to have been Morrisdale Miller Seam Coal, a bituminous coal.

"(d) Where did that coal come from?

"Answer. The respondent has no knowledge as to where the coal came from other than that it was purchased from the Morrisdale Coal Company.

"(e) Where was each such lot of coal loaded on the 'Galileo'?

"Answer. Each lot of coal was loaded on the 'Galileo' in the harbor of New York.

"(f) How was each lot of coal stowed with relation to the other lots of coal in No. 3 'tween-deck?

"Answer. The relation of the stowage of these two lots of coal was that the first lot of coal was scattered about in

No. 3 'tween decks, and the second lot of coal was stowed on top or alongside of the first lot.

"(g) How old was each such lot of coal?

"Answer. The first lot of coal had been on board since about June 30, 1926. The second lot of coal had been on board since on or about August 26, 1926.

"(h) In what enclosures, containers or holds had it been confined after its receipt on board the 'Galileo' and for what period of time?

"Answer. The first lot of coal had been in No. 3 'tween decks since about June 30, 1926; the second lot since about August 26, 1926.

"(i) What was the condition of the temporary wooden [fol. 136] bulkhead in No. 3 'tween-deck as to being watertight?

"Answer. The temporary wooden bulkhead was in good condition but was not supposed to be watertight.

"(j) What kinds and quantities of cargo were stowed in No. 3 'tween-deck forward of the temporary wooden bulkhead?

"Answer. The respondent is unable to answer this question definitely at the present time, but is endeavoring to obtain the information and will supply it as soon as it is received.

"(k) Was lard or other similar substance stowed forward of the temporary wooden bulkhead?

"Answer. Same as answer (j).

"Fourth interrogatory: (a) What was the extent of the fire on the 'Galileo'?

"(b) Exactly what parts of the 'Galileo' were burned by the fire and to what extent?

"(c) What was the nature and extent of the physical damage to her hull structure which the 'Galileo' sustained as a direct result of contact with the fire?

"Answer. The only information which the respondent has with respect to these interrogatories is contained in the survey report attached hereto in answer to the sixth interrogatory.

"Fifth interrogatory. Where was the 'Galileo' when the fire broke out?

"Answer. The 'Galileo' was proceeding to sea and was in the neighborhood of Fire Island Light Vessel when the [fol. 137] first indications of a fire were observed.

"Sixth interrogatory. Produce a copy of the entries in the scrap or rough deck and engine room logbooks of the 'Galileo' covering the period of the fire and the examinations and surveys afterwards made to ascertain its cause and extent.

"Answer. The scrap or rough deck and engine room logs were lost with the sinking of the vessel. The survey report is attached hereto.

"Seventh interrogatory. What persons first observed the fire and what did they see?

"Answer. By reason of the absence of the crew of the vessel the respondent is at present unable to answer this interrogatory. The information will be supplied as soon as it is obtained.

"Eighth interrogatory. What persons were present when the fire broke out?

"Answer. Same as answer to the seventh interrogatory.

"Ninth interrogatory. How long did the fire continue?

"Answer. Upon information and belief the fire continued until the vessel submerged on August 30, 1926, at about 4:50 A. M."

I also show you a stowage plan of the vessel, which is in evidence as Libelant's Exhibit No. 13, and three sketches which have been marked in evidence as Libelant's Exhibits 10, 11 and 12, showing the location of the bulkheads in what is called the shelter deck and the lower between decks. I also show you a photographic copy of a plan of the steam-[fol. 138] ship "Galileo", which has been produced by the other side.

Mr. Jones: I ask that this be marked in evidence.

(Marked Libelant's Exhibit 18 in evidence.)

Q. (Continued.) The plan of the ship which I now show you having been marked in evidence as Libelant's Exhibit No. 18, Mr. Bagger, one of the surveyors who examined the ship during August, 1927, testifies as follows:

"This vessel (meaning the Galileo) is of the shelter-deck type with three steel decks. The side or shell frames are spaced twenty-seven inches in the holds, lower 'tween-deck, and upper 'tween-deck (or shelter-deck) spaces but the deck beams for the two lower decks are on alternate frames while

the weather deck beams are on every frame. The enclosed sketches show the arrangement of the hatches, bulkheads, etc., forward of the forward boiler room bulkhead. This bulkhead is of steel extending from the D. B. tank top to the upper 'tween-deck. There is a steel bulkhead twelve feet forward of this which extends up to the weather deck but in the lower and upper 'tween-deck spaces it is of steel only in the hatchways while at the sides or wings of these compartments it is of wood covered with burlap and fitted with passageways. In the lower 'tween-deck compartment this steel bulkhead serves as the after part of the grain feeder for #3 hatch extending five feet fore-and-aft, the width of the hatch, and from the lower 'tween-deck to the upper [fol. 139] 'tween-deck. There is a wooden bulkhead between #2 and #3 lower holds. In the lower 'tween-deck there has evidently been a wooden bulkhead at the 21st frame forward of the boiler room bulkhead as on the port side of the deck there is a piece of the sill remaining which is tommed or shored off from a nearby stanchion. Also there is a quantity of caked coal and grease at this place about fifteen feet athwartship, one to three feet fore-and-aft and three inches to two feet high. On the starboard side there is also a pile of coal and grease about twelve feet athwartship, six feet fore-and-aft, and two to three feet high. These two piles are banked up square at the forward edges indicating the presence of a bulkhead, subsequently removed. The upper 'tween-deck space has had a light wooden bulkhead about seven feet aft of the after end of #2 hatch; some of bulkhead is still in place."

Q. I show you photographs which have been offered in evidence and marked Libelant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9, and it has been stipulated between the parties that all the coal in No. 3 between decks was of the run of the mine coal. With the facts which I have given you, are you in a position to give an opinion as to the contributing causes of the fire which occurred in the coal in the No. 3 between decks?

A. Yes, sir, I am in a position to give an opinion on that.

Q. Now, will you give us your opinion and state what in your opinion were the contributing causes to the fire, and state it fully, please, Dr. Porter, so that we will understand exactly what you mean?

A. I would state as one of the contributing causes in my [fol. 140] opinion the fact that a restricted amount of ventilation, or it might be called ineffective ventilation, was established by the conditions on the ship, of air through the coal in the No. 3 lower between deck space. A certain amount of air was allowed to pass through the coal, but not enough air to thoroughly ventilate it and cool it.

By the Court:

Q. How do you judge how much air was allowed to go through it?

A. Your Honor, I cannot judge exactly the amount, of course, but by the conditions established by these photographs and the testimony of the surveyor, it is my opinion that the amount of air must have been restricted, that some air passed through the coal, but not a sufficient amount to keep it cool. I am judging of all that by the drawings and sketches that have been made and the statements of the surveyor as to his observations on the boat. A second contributing cause——

By Mr. Jones:

Q. Did you also take into consideration the interrogatories and answers which I read to you, which stated that this bulkhead was not watertight?

A. Yes.

Mr. Keating: Objected to. He is a well-qualified man and he has been asked to state what he took into consideration. I object to his being led.

Mr. Jones: I am not leading him, if your Honor please. [fol. 141] The witness, as your Honor can see, is a highly intelligent man, and I think any suggestion that this witness could be induced to say anything but the truth is improper.

The Court: It was a very suggestive question of yours.

Mr. Jones: I asked him if he did take it into consideration.

The Court: Please don't do it again. I will let it stand as it is. The fact was yours rather than his and that is what constitutes a leading question.

The Witness: My previous statement was, your Honor, that I based my judgment on the testimony of the ship's surveyor and on the sketches and photographs. The sur-

veyor testified as to the appearance of the bulkhead which he saw, or the remains of the bulkhead, and that was enough to indicate clearly to me that the bulkhead was not tight.

Mr. Keating: Well, now, your Honor, I move to strike the witness's answer out because that bulkhead was in the shelter deck and not in the between decks, and therefore this witness is taking into consideration a fact that was not put to him. The bulkhead in the between decks was entirely burned away, except the sill, and he bases his judgment on the bulkhead which was in another part of the ship and which was not burned. I move to strike the witness's testimony out.

Mr. Jones: I submit that the testimony is entirely proper, and ask that Dr. Porter be allowed to complete his [fol. 142] answer to my question, and then——

The Court: I will not strike out the answer, with exception to the other side, but on the other hand, I would like to know whether the point isn't a good one, that he did take into consideration something that was not in the hypothetical question. In my understanding of it he did. What is your understanding?

Mr. Jones: My understanding was that he did take into consideration the surveyor's testimony. I will ask him.

By Mr. Jones:

Q. Now, disregard the surveyor's testimony as you heard it, and take into consideration only the facts which I gave to you, as I stated them to you in the hypothetical question, and can you, on the facts which I stated to you, state an opinion, irrespective of what the surveyor stated, keeping in mind that you are only to use the facts which I stated to you in the hypothetical question; and if necessary, I will have the stenographer read it over?

A. I remember them and can state an opinion based on them.

By the Court:

Q. Is your opinion the same, based on solely those facts?

A. Yes, sir.

Q. Well, how does the fact that the bulkhead was not watertight—how did that decrease the amount of ventilation in the coal, decrease it?

A. Your Honor, the fact that it was not watertight did [fol. 143] not increase the ventilation, I did not mean to give that impression, I think I did not so state, if you will permit me. I stated that the presence of a bulkhead which would permit some air to penetrate caused a restricted amount of ventilation. In other words, the bulkhead restricted the ventilation, but did not entirely shut it off.

Q. Oh, yes.

A. I have not completed my answer.

By Mr. Jones:

Q. I wish you would complete it and enlarge on that further so we may all understand, Dr. Porter, why a restricted ventilation is dangerous.

A. The question as I remember, you asked me my opinion as the contributory causes of the fire.

Q. Yes.

A. And I was about to name a second contributory cause.

Q. Will you proceed and do that?

A. The second cause, in my opinion, was the stowing of a fresh supply of coal on top of or alongside of an old supply which had been in the bunker for two months. This is well-known to be a dangerous practice. The third contributing cause is the fact that coal in being placed on a pile or in a bin will segregate as to sizes, the larger sizes or lumps will roll down on the sides to the bottom of the pile, and in my opinion, when this space was loaded with coal the larger sizes or lumps rolled down to the temporary bulkhead and formed a section there of lumps or larger pieces, through which air could easily penetrate.

Q. Well, on what fact do you base that opinion?

A. On my own experience in handling coal and watching coal placed in storage.

[fol. 144] Q. What is meant by "run of the mine" coal?

A. Run of the mine coal is coal as it comes from the mine consisting of lumps and fine sizes mixed.

Q. In loading run of the mine coal into a bin or compartment have you ever had any experience with that as to what happens to the coal?

A. Yes.

Q. Will you tell the Court what your experience has been and your observations?

A. As to the way the coal behaves?

Q. Yes; did you make a special study of that in connection with the whole problem?

A. Yes, I did.

Q. Will you please tell the Court what was the result of your observations?

A. It is a general rule, and has been my experience, that when coal is dropped from a handling machine on to a cone-shaped pile, the larger lumps roll down from the peak of the pile to the sides, leaving the finer parts in the center. Those lumps and larger pieces in that way tend to form a section around the edges of the pile, through which air can easily pass. That was the point I believe that you asked me particularly?

Q. Yes. Now, Dr. Porter, you have stated that one of the contributing causes of the fire was the ineffective ventilation of the coal. Will you explain in detail why such ineffective ventilation was a contributing cause of the fire?

Mr. Keating: I want to know whether the witness has named all the contributing factors before another question is asked.

By Mr. Jones:

Q. Have you named all the contributing factors, Dr. Porter, or do you want to mention any others?

[fol. 145] A. I have none in mind I want to mention now; there may be other contributing factors.

By the Court:

Q. Just the two, you want to tell me about: First, ineffective ventilation, and second, the placing of new coal on the old coal, those are all?

A. The third one was the physical manner of placing the coal.

Q. That has only to do with the ventilation, hasn't it?

A. Yes.

Q. It is a subsidiary part of the ventilation, isn't it?

A. Yes, sir, related to the ventilation.

By Mr. Jones:

Q. Now I will repeat the question in which I was interrupted. You have stated that one of the contributing

causes of fire was the ineffective ventilation. Will you tell us in detail why that was a contributing cause of the fire and also describe the chemical changes which result from such ineffective ventilation?

A. The spontaneous heating of coal results from a slow accumulation of heat formed from the action of the air upon the coal, beginning at ordinary temperature, at room temperature. Spontaneous heating cannot go on in coal without the presence of air. A certain amount of air is required to cause this oxidizing process, the action of air upon coal produces it. Ordinarily combustion of coal in a furnace is a quick, rapid combustion, producing a great deal of heat in a short space of time, but the same oxidizing process goes on at ordinary temperatures very slowly, building up heat at a slow rate, but due to the same action, [fol. 146] the action of air, or the oxygen in the air upon the coal. Now, if the heat that is developed slowly by that process going on at ordinary temperatures is held in or allowed to accumulate without being scattered, or a rapid current of air, or other cooling effects, it increases the temperature of the coal continuously. Then the oxidizing action, the burning action, goes on still more rapidly as the temperature rises, until finally, if it is not allowed to escape, the coal takes fire, always supposing that a sufficient supply of oxygen is brought to it to keep the action going. A supply of oxygen means ventilation. We have to have air coming to the coal to carry on this oxidizing or heating process. However, if there is a large sweep of air through the coal, there is a large excess of air, that is not required entirely for oxidation, it carries the heat away and cools it. It has been proposed to thoroughly ventilate coal piles, coal stocks, by a great deal of ventilation through pipes, to keep it cool in that way, by a large supply of air sweeping all the heat away, but that has not been found practicable because it is difficult to get that air to all parts of the coal stock. You can't get enough air to every section of the coal stock to keep it cool enough; you can't be sure of always sweeping away every bit of heat that is formed in every part of the coal stock. Now, if a certain amount of air is allowed to seep through underneath the coal, a small amount sufficient to keep this oxidizing process going, but not enough to cool the coal, the spontaneous heating proc-

ess will go on and build up its heat until the coal takes fire; but if air is entirely excluded and there is no oxygen to carry on the process, consequently we can't have a heating without oxygen.

[fol. 147] By the Court:

Q. How does the fact of putting new coal near old coal make it still more dangerous?

A. That, your Honor, comes from the fact that coal, after it has been kept in storage several weeks, even for one week sometimes, depending on the kind of coal, becomes slightly warm, even though it has had surface ventilation enough to cool the surface; it becomes slightly warm, although not hot enough to burn, and therefore, when you put a new supply of coal on top of it, the warmth of that old coal is held in by the insulating effect of the new supply placed on top of it, and in addition to that the point where the two surfaces come together, the fresh coal supply and the old pile, is almost always a point where air can filter through. Those facts, the warmth of the old pile, not sufficient to burn it by itself, coupled with the air supply and the insulating effect of the layers of coal placed on top, keeps the heat in and allows it to build up, accumulate.

By Mr. Jones:

Q. Is it considered safe among persons familiar with the handling of coal to put new coal on top of old coal, Dr. Porter?

Mr. Keating: I object to this. This is a ship case.

A. No.

Mr. Jones: If your Honor please, here is a witness thoroughly familiar with coal, and coal on a ship doesn't behave any differently than anywhere else.

[fol. 148] The Court: Your question is incompetent; I sustain the objection on that ground. You can ask him more about the effect, and the Court will say whether it is competent or not.

Q. Dr. Porter, have you made a study of the matter of placing old coal on top of new coal?

A. No, I have not.

Q. You are familiar with the general principles in connection with it?

A. Yes.

By the Court:

Q. You have never studied that yourself?

A. I have never experimented by placing with my own hands the supply of new coal on top of old. I have observed the results of such a practice.

By Mr. Jones:

Q. You have observed the results of such a practice?

A. Yes.

Q. And you have observed the physical conditions from which such results flow, Dr. Porter?

A. Yes.

Q. And are you familiar with the general knowledge of that subject among persons who handle coal?

A. Yes, I am.

Q. Now, can you say whether or not it is considered safe by persons familiar with the coal business to put fresh coal on top of old coal?

Mr. Keating: Objected to.

The Court: It is incompetent, Mr. Jones. You can go further into details as to the effects of it, but as to whether it is safe or not is a matter depending on all sorts of cir- [fol. 149] cumstances unrelated to this case; it might be perfectly safe to do it under certain circumstances and not under others.

Exception.

Q. Then will you state to us what the physical and chemical effects to be anticipated are in the placing of fresh coal on top of old coal?

A. The physical effects are to cause the holding in of the heat of the old coal.

By the Court:

Q. Anything in addition to what you have told us? You have told us that part of it. Now, we don't want you to repeat, but if there is anything in addition, it will be interesting.

A. I think, your Honor, I didn't mention the chemical effects which consist of a more rapid oxidation as the temperature rises. The physical effect of drawing air along that passage or zone between the old coal and the new causes a chemical reaction or oxidation to go on more rapidly as the heat builds up and is held in by the installation of the new supply of coal.

Q. Now, what physical result is known to be expected from that condition?

A. Generally in such cases the coal continues to heat to the point of active combustion and fire.

Q. Do you know whether or not that fact is generally known by people who deal in coal?

A. Yes, I do.

Q. Is it generally known?

A. Yes.

Q. Do you know what is meant by "through ventilation"?

A. Yes, that is a term commonly used in connection with [fol. 150] coal storage. The term means, as I understand it, the drawing of air through a coal stock from underneath or the sides, so as to penetrate the pile of coal.

Q. Have you ever investigated actual cases of spontaneous combustion in large piles of coal?

A. Yes, I have.

Q. Describe to the Court some of the investigations which you have made.

A. I have investigated large storage piles of coal in the open air, piles of 100,000 to 300,000 tons, and have experimented myself by taking temperatures at various points in the pile and examining the physical character of the coal as to the lumps I find in different sections and the penetration of air through the pile. One of these cases was a large industrial plant at Milwaukee, Wisconsin, where 300,000 tons were stored, and another at Chicago. I have investigated cases of spontaneous fires on a ship, shipboard, and have observed and studied coal-bin fires in large power plants. One case, if I may go into detail, here in New York, a large power station, New York City power plant, where the bunkers for the boilers were over the boilers and the gates at the bottom of the hopper shed bunker were in some cases not entirely closed, allowing

a slow seepage of air through the opening at the bottom of this hopper, so as to cause through ventilation of a restricted amount of air, which, coupled with the slight amount of heat obtained from radiation from the boiler room, set fire to the bunkers in several cases.

Q. Are they ship bunkers you are telling us about?

A. This case I spoke of last was in a power plant in New York City.

Q. Tell us about ship's bunkers.

A. I investigated a case on a steamer of the Panama [fol. 151] Pacific Line while I was in the Government service where a bunker fired some coal stowed alongside of a steel bulkhead, which obtained a little heat from a pile of dry ashes or cinders on the other side of the steel bulkhead. The coal, being slightly warmed in that way and being lumpy so as to allow a certain amount of air to seep through it, took fire.

Q. Now, Dr. Porter, have there been many authorities published dealing with this problem of through ventilation?

A. Yes, there have been a great many papers published on the subject.

Q. And do you know what the conclusions reached in those various papers are?

A. Without exception——

Mr. Keating: Objected to. This witness can testify as to his own conclusions, but what somebody else concludes is another matter. I object as incompetent.

Mr. Jones: This is a matter of general knowledge, this matter of the through ventilation of coal. It is introduced in Lloyds Register of Shipping, in which they comment on the point, also the Board of Trade, and there are a hundred publications——

Mr. Keating: No, the publications——

The Court: Objection sustained.

Exception.

Q. Now, what is your conclusion, Dr. Porter, as to the matter of through ventilation in coal, as to whether or not it is a dangerous practice?

A. It is a dangerous practice and should be avoided in the storage of coal.

Q. Is the fact that it is a dangerous practice a fact gen-
[fol. 152] erally known among people who are interested in coal?

A. It is.

Mr. Keating: Objected to. It may be known in laboratory plans, but this is a matter he has to bring home to ship owners. I move to strike it out.

Mr. Jones: What is the common knowledge of persons dealing in coal is a fact. I have a witness here who has studied the matter on ships and who is entitled to state it.

The Court: I will permit the witness to state what is generally known, but I want him to say where it is generally known. The fact that it is not generally known among ship owners won't make the question incompetent. I think, but I would like to know whether it is in his intention to testify that it is known to ship owners or to men dealing in coal——

Mr. Keating: Or to college professors.

The Court. I will allow him to say if he will say where it is generally known.

A. Your Honor, I can answer your question positively without any hestitation that it is generally known among ship owners and shipping interests that through ventilation should be avoided in coal bunkers.

By Mr. Jones:

Q. On what observation do you base that answer?

A. On recommendations that have been made by ship-
[fol. 153] ping agencies, such as Lloyds of London, and the Board of Trade in London, and published in several places.

Q. How long ago have those publications been in circulation?

A. One set of regulations for Lloyds was published in 1912, and the Board of Trade, the English Board of Trade, I think was 1922.

Q. Are you in a position to say whether or not a between decks space such as is shown on the sketch, Exhibit No. 10, and marked B on that sketch, consisting of steel sides of the ship, top and bottom space consisting of steel decks, the forward part of the space consisting of a long watertight temporary bulkhead, the space having two ventilators,

each of which is located 23 feet 8 inches apart, on the wooden bulkhead, and with a wooden bulkhead at the after end of the space, is a safe place in which to stow coal—assuming that the between deck space forward of the space which is described as the ventilators, leading from the air space into such forward part of the between deck space?

A. Yes, I am in a position to state.

Q. Well, will you give us your opinion?

A. My opinion is that it is not a safe place to stow coal.

Q. What are your reasons for so stating?

A. There were ample opportunities there for partial ventilation through the coal. Just the condition that I have explained in previous answers as being dangerous to coal storage. The wooden bulkhead not being watertight was certainly not airtight, and therefore air could seep through the cracks, openings, between the boards, and the construction of a bulkhead to the roof of the compartment above the level of the coal would tend to restrict the drawing of [fol. 154] air off the coal so as to make it tend to pass through underneath the surface of the coal. In other words, the action of the ventilators to the upper deck, instead of having a free pull of air over the coal, would tend, on account of the bulkhead, to pull it more underneath the surface.

Q. Why is that true, Dr. Porter?

A. The presence of the bulkhead above the surface of the coal shuts off the free flow of air above the coal and therefore creates a suction, pulling air through the bulkhead underneath the coal surface. Now, the ventilators communicate with the space above the coal in that lower between deck compartment, and regardless of the fact whether the current or air were downward or upward through the ventilator, there would certainly be a current of air from that ventilator, inducing currents of air through the coal, passing between the small cracks in the wooden bulkhead.

Mr. Keating: We haven't had any cracks in this case yet. I object to that statement.

The Court: They have this, that a bulkhead that isn't watertight is not airtight, and that presupposes some kind of apertures, whether you would call them cracks or holes or interstices.

Mr. Keating: They might have been loose joints.
The Court: That may be.

Q. It doesn't make any difference whether we call it a crack or interstice, or whatever it may be called; so that is what you have to say?
A. Yes.
[fol. 155] Q. Had you finished your answer, Dr. Porter, when you were interrupted?
A. Yes, I had finished.
Q. Now, Dr. Porter, if we eliminate the placing of the new coal on top of the old coal as one of the causes of fire, can you say whether or not coal ventilated in the manner which has been described to you would still have been likely to have caused spontaneous combustion?
A. In *any* opinion it would have been, yes.

Mr. Jones: Now, Mr. Keating, I understand that you were to check up on this Board of Trade——
Mr. Keating: I am going to reserve my objection to that until I look it over.
Mr. Jones: Then, if your Honor please, I would like to have the opportunity of taking a deposition in London to prove that this is an official publication of the Board of Trade, this Exhibit 17.
The Court: Well, we will consider that.
Mr. Jones: I now formally offer Exhibit 17.
Mr. Keating: I object to it on my former grounds, and I have not seen it.
Mr. Jones: I will let you see it.

Objection sustained.

Q. I call your attention to this paragraph which I am reading from this document, and ask you whether or not——

Mr. Keating: I object to this witness being led by statements read out of a pamphlet.
[fol. 156] The Court: No, you can't do that.
Mr. Jones: I am not leading, if your Honor please. I am going to call his attention to a statement contained in that pamphlet.

The Court: You see, we don't know what the pamphlet is.

Mr. Jones: He has read it.

The Court: But so far as I am concerned it is a pamphlet you picked up on the street, written by some man who didn't know what he was writing.

Mr. Jones: I will tell you what I am going to do. Dr. Porter has testified that a compartment should have a ventilator both at the forward and after end. I want to show from this official document of the Board of Trade that it is exactly what they provide.

The Court: Isn't that exactly proving the contents of this thing?

Mr. Jones: Will your Honor give me an opportunity to prove it?

The Court: I will consider it when you make the motion. It will depend, Mr. Jones, on whether I think you used diligence ahead of time. Unless your opponent consents, it is immaterial to me whether the case is closed now or three months from now, when you get your depositions back, but on the other hand, it may be material to your opponent, and I have to consider what he might urge in objection, and I haven't considered that at all. Maybe I will decide in your favor on that point anyway.

[fol. 157] You have asked me if I will give you permission to take a deposition. I will endeavor to do the just and proper thing.

Q. Now, as I understood you, Dr. Porter, you referred to a question of the surface ventilation as well as to the through ventilation. Now, will you describe that to us a little more in detail?

A. Surface ventilation, as I understand it, means the cooling of the surface of a coal stock by a free sweep of cold air over the surface, to carry away the heat that may accumulate in the air above the surface of the pile, and in that way cool the surface.

Q. Can you say whether or not that is a recognized practice, that it should be so ventilated?

A. Yes, it is a well-recognized practice.

Q. Are you in a position to say whether or not, when the only surface ventilation is from ventilators which are in the after part of the hold, that is a sufficient surface ventilation?

A. From one ventilator only would be insufficient ventilation.

Q. Now, what I want you to answer me—I suppose there are two ventilators, but both in the forward part of the hold and not in the after part of the hold; would that be sufficient ventilation?

A. No.

Q. Why not?

A. Because it wouldn't draw air off all parts of the pile.

Q. Now, you have referred to the ventilation in the forward part of the hold. I direct your attention to the ventilator which appears in the after part of the hold, as shown on the photographs, especially photograph No. 3, where the bulkhead is testified to as being in the form as shown on that photograph, and constructed of planks which run hori- [fol. 158] zontally with the deck and with a burlap curtain over them, and I ask you to say whether or not that bulkhead would admit air into that compartment?

A. Yes, I would judge a bulkhead of that type, marked B on the photograph, would admit air to the compartment.

Q. In your opinion, is that a proper bulkhead for a compartment in which coal is stowed?

A. No, it is not.

Q. Why not?

A. Because of the fact that it is not airtight and would admit some air through the coal underneath the surface, causing spontaneous heating to go on.

Q. I have found one of my friends who corrected me now agrees with you that it is the after part of the hold. Does that make any difference in your answer?

A. No, it does not.

By the Court:

Q. You said in answer to one of Mr. Jones' questions that disregarding the fact that there was new coal put on or near the old coal, that there would be a likelihood of spontaneous combustion under the conditions that he described?

A. Yes, sir.

Q. Now, there would be a time limit involved there, wouldn't there?

A. Yes, there would.

Q. Spontaneous combustion would not arise immediately, would it?

A. Not immediately, in all probability.

Q. Can you give me some idea as to that time limit, how long that would take to develop?

A. I cannot say, your Honor; that would be indefinite, it is rather more——

Q. When you said there was any likelihood of spon- [fol. 159] taneous combustion you were entirely disregarding the element of time?

A. Not entirely, your Honor.

Q. Well, what time were you regarding, what time were you considering?

A. It would be likely, in my opinion, that spontaneous combustion might be set up in less than a week or ten days.

Cross-examination.

By Mr. Keating:

Q. Dr. Porter, I will ask you to assume that what you have been pleased to call the old coal was in the ship on the 26th of August, 1926, and as you said, had been there for a little less than two months, having been first put in the ship on June 30, 1926. That is in accordance with the way you understood Mr. Jones' question, those two facts, is that correct?

A. That is in accordance with my understanding of the answers to the interrogatories.

Q. Yes. Now, how much coal did you assume was in No. 3 between decks and how much additional coal did you assume was put in, in answering the questions to his Honor?

A. I assumed that a total of 160 tons of old coal so-called was in the vessel, as stated in your answers to interrogatories.

Q. And how much additional coal did you assume had been put in?

A. I made no assumption as to that. My memory does not serve me well enough to enable me to answer that; there may have been a statement on that, but I don't remember it.

Q. Would it make any difference if pounds were put in in your answer?

A. Yes, it could.

Q. How much has to be put in in order to affect your answer?

[fol. 160] A. Enough to cover the surface of a considerable portion of the old pile of coal; it is rather hard to be perfectly definite on that—exact, I should say.

Q. Now, Dr. Porter, will you assume that before the new coal was put in there were 160 tons of coal left over from the previous voyage and that the engineers went down there and the coal showed no sign of heating to the touch of the hand, and there was no odor of gas from the coal; and I will assume also that the fire was discovered on the 28th, between two and three days later. I will ask you on that assumption, have you ever known of a case of spontaneous combustion starting under those circumstances in that time?

A. I have known of cases very similar to that in which spontaneous combustion started. We never have exactly the same conditions in any two cases of coal storage, or coal; they are always slightly different, they can't be exact in every particular.

Q. I ask you first of all—give it to me as your opinion—if that coal was cool and there was no smell of gas, could that coal have been on fire by spontaneous combustion in two days?

A. Yes, sir, it could.

Q. Do you know of any case where that happened—give me the case where that happened of your own knowledge?

A. As I say, I cannot give you a case because the conditions are always slightly different; I couldn't give you an exact duplicate of any case.

Q. In giving me the answer to that question as you have, have you assumed all the other conditions, the small amount of air coming through the ventilator, and all that sort of business—have you made that assumption or have [fol. 161] you assumed some other factor which caused that quick firing?

A. I don't quite get your question. What is the question?

Q. I want to know whether in giving me the answer that that coal could have fired by spontaneous combustion, assuming it was cool and was giving off no gases from the 26th and to the fire on the 28th, whether you are assuming

in giving that answer the same conditions precisely, with the exceptions that I have given you, that you made in answering Mr. Jones' question?

A. Mr. Jones asked me a great many questions. I don't know which one you refer to.

Q. The first one, the long one, by which we were all bored to death; that is the one I am referring to.

A. I still don't understand the question.

Q. You are a little duller on cross examination than you were on direct.

Mr. Jones: I move to strike it out.

The Court: Strike it out.

Q. I am asking you to assume all the conditions stated by Mr. Jones in his long hypothetical question.

A. I understand that.

Q. With this change that I asked you to assume, that the so-called old coal was not heated, was not warm, and that it was giving off no gases from the 26th, and I ask you whether in your opinion under all those circumstances that coal could have been on fire from spontaneous combustion to such an extent that the whole ship was almost burned up on the 28th?

Mr. Jones: Now, if my friend is going to ask that question, let him put on his evidence so we can discuss facts [fol. 162] which are in evidence. Here the facts are not in evidence, and he is simply raising an assumption; it seems to me we are getting far afield if he is stating hypothetical questions here. It doesn't clarify the situation at all.

The Court: It won't hurt you. Objection overruled.

Exception.

A. I still say that it would be likely in my opinion to take fire. I will explain that if you will allow me.

Q. Yes.

A. The point that you mention about gas coming from coal is no indication of the fact that it is not warm. In other words, warm coal does not always give off gas; the coal might be slightly warm and not give any odor of gas. When I said in my previous answer to Mr. Jones' question as to putting fresh coal on to old, that the old coal was likely to be warm, I did not exactly mean to say it would

give an odor of gas. All that is required is a slight degree of warmth. The oxidation process goes on very much more rapidly with even a few degrees of heat. Also, if the coal were slightly warm, the old coal, in certain spots, and not in others.

Q. I am asking you to assume, Dr. Porter, that it was not warm.

A. In any spot?

Q. In any spot.

Mr. Jones: Do you mean inside as well as outside?

Mr. Keating: That the coal was not warm in any particular.

A. Even so, it is my opinion that it could have fired inside of two days.

[fol. 163] By the Court:

Q. Why did you tell me ten days? I asked you that question.

A. As I understood your question it was assuming that there was no old coal.

Q. I said entirely eliminating the question of old coal, being on new coal, eliminating that, and I asked if there was a time limit, and you said it would take a week or ten days.

A. Well, I beg your pardon if I misunderstood your question. As I understood your question it was eliminating the factor of an old coal supply, assuming that there was no old coal present. I understood you to say if the bunkers were loaded with fresh coal, without any old coal being left in them, could it have fired in two days.

Q. All right.

A. And I replied to that very likely not, but in my opinion it might fire in a week or ten days, without any old coal supply present.

Q. Now, if this coal were perfectly cool inside, the fact that it had been there for months, would that make it more ready to fire?

A. Yes, sir, in my opinion it would.

Q. Even though it was just as cool inside?

A. Yes, sir.

Q. Why is that?

A. My explanation of that involves a little more technical or scientific factors, but it is this: That coal absorbs

oxygen; it is well-known by scientific investigators that coal absorbs in its pores oxygen, which slowly acts on the coal surfaces of the particles. Now, as the old coal lies there in stock it is accumulating an absorbed supply of oxygen on the surfaces of all the particles. Now, when the fresh coal is piled on top of it, that accumulated oxygen stored on the [fol. 164] surface of those old particles gets in its work on account of being insulated by the overlying pile of new coal——

Mr. Keating: I thought your Honor asked him to regard only the old coal and not regard the new coal.

The Court: Yes, I eliminated all the old coal too.

Mr. Keating: Let me put your Honor's question to this man.

By Mr. Keating:

Q. Disregard the new coal and assume that what you call the old coal was perfectly cool coal, the same as any new coal would have been, and that it was not giving off any gases and that it was cool. Doe its age have anything to do with it under those circumstances, and would it be likely to spontaneously combust in two days, assuming no new coal was put in ther at all? Just deal with the old coal.

A. In my opinion there is a possibility that it might have.

Q. Have we got from a likelihood to a possibility?

Mr. Jones: I object to that. That isn't what the witness said. He said he was talking of a fresh supply being put on an old supply and now he is putting another question to the witness which the witness has answered, and counsel is adopting an attitude which I think is insulting.

Mr. Keating: Have I insulted you, Dr. Porter?

[fol. 165] The Witness: No.

Mr. Keating: Mr. Jones is the only man whose feelings are hurt.

The Witness: Do you want me to go a little further in my answer?

By the Court:

Q. Tell us what you have in your mind?

A. All cases of spontaneous combustion are subject to a great many factors. It is more or less of a game of chance

if you get everything just right, the condition is right, the factors that are required for holding in the heat and producing the heat, it is likely to go, to take fire; but there is more or less of a chance connected with it and no witness, no expert, can be absolutely positive and exact in his statements as to the surety of a fire taking place under assumed hypothetical conditions.

By Mr. Keating:

Q. Now you have said something that I agree with. Now, isn't it a fact that spontaneous combu-tion sometimes occurs in cases that are complete puzzles? Is that correct? Is it possible to investigate all these cases of spontaneous combustion?

A. Yes, sir, it is.

Q. Now, have they all been investigated?

A. No, I didn't say they had all been investigated.

Q. You said first, I have got a note here, spontaneous combustion results from slow accumulation of heat. Have I got you right?

A. I believe so.

Q. Well, don't you know so? Have I stated you correctly [fol. 166] or not?

A. That is my recollection of my answer.

Q. Now, what do you mean by a slow accumulation of heat? I would like you to put that into hours and minutes and days and months.

A. Well, that is impossible to answer.

Q. Well, we will start out with freshly mined coal—of course, I am talking about the conditions in this ship, I am assuming here the conditions that Mr. Jones tells about. Now suppose there was fresh coal, what you call fresh coal, put in there, how long would it be before this slow accumulation of heat resulted in a fire? I want minutes, hours, days, months, or if you prefer, years.

A. Well, evidently from the testimony that has been given in this case and your answers to interrogatories it required about two days in this case.

Mr. Keating: I move to strike it out.

The Court: Strike it out.

Mr. Keating: I ask that the witness be instructed to be fair with me. I have asked him a plain question, to start

out with fresh coal and the other conditions and to tell me when this slow process of heat——

The Court: It may be the witness misunderstood your question.

By the Court:

Q. Assuming the physical conditions of this boat as shown in the hypothetical question, and that fresh coal, freshly mined coal is put in to the extent of about 160 tons, how long would it take that to catch fire spontaneously?

A. Placed on top of the old?

[fol. 167] Q. No, 160 tons of freshly mined coal.

A. Well, that is impossible to answer; I can't give you any answer to that.

Q. Well, we don't want it in minutes or days either unless you can get it down to days; would it be a matter of a month or a year or a week?

A. No one could say as to that; no expert would venture an opinion as to the length of time required.

By Mr. Keating:

Q. Would he venture an opinion that it would take place in two months?

A. It might take place in less than two months.

Q. Would it be likely to take place in two months?

A. Yes, it would, in less than two months.

Q. Well, why did you tell me that no expert would venture to give an opinion to say how long it would take, or put any limit on it?

A. I didn't say that. I said no expert would venture an opinion as to the minutes, hours and days for a fire to start under those conditions.

Q. Well, can you be more definite as regards days? I don't want to pin you down to minutes, or if you like, months.

A. I answered your last question by saying that in my opinion it would take place in less than two months.

Q. How much less?

A. I can't say as to that.

Q. Now, Dr. Porter, you were talking about that ventilator leading into No. 3 between decks. Now never mind those papers for a minute. Where did that ventilator go

to? In answering Mr. Jones' hypothetical question will you kindly give me a description of the ventilator? I want you to tell me how big it was, where it led from and to, [fol. 168] and how you have assumed it was trimmed to the wind, and how much cubic air per hour it would likely displace in that compartment at various ranges of the wind? First of all, can you tell within one or two or three or four, how many ventilators you think there were in that hold?

A. In the hold of the vessel?

Q. In the compartment No. 3 between decks.

A. Two in this compartment, I am assuming.

Q. Where were they?

A. One on the starboard side and one on the port.

Q. How large have you assumed they were?

A. I had no knowledge of their size. I am assuming that they were about 12 or 14 inches in diameter.

Q. Would it make any difference in your testimony how big they were?

A. Within certain limits it would.

Q. What are the limits within which the difference would be made?

A. If they were less than 3 inches I would say that would make a difference.

Q. If they were less than 3 inches, and suppose they were more than 20 feet, would that make any difference?

A. In diameter?

Q. Yes.

A. Yes.

Q. Well, give me the range; you have answered a hypothetical question and given an opinion on it, and one of the questions is the size of the ventilators. What is the size of the ventilators?

A. I assume they were in the neighborhood of 12 or 14 inches, as I remember.

Q. And your answer is based on that assumption, is it?

A. Yes.

(Adjourned until Thursday, November 7, 1929, at 10:30 A. M.)

[fol. 169] New York, November 7, 1929.

(Met pursuant to adjournment at 10:30 A. M., present as before.)

HORACE C. PORTER resumed the stand:

Cross-examination continued.

By Mr. Keating:

Q. Dr. Porter, will you please tell me whether you have had any experience as an officer of a ship?

A. No, sir.

Q. You are a chemical engineer, is that correct?

A. Yes.

Q. You are not a combustion engineer?

A. I would qualify that answer by saying I have had experience in combustion engineering, fuel and combustion engineering.

Q. Have you ever been in the bunker of a ship?

A. Yes.

Q. When?

A. On several occasions; I can't give the exact dates.

Q. Recently? Are they all within the last couple of months?

A. Not within the last two months, no.

Q. How many ships have you been in, all told?

A. I can't state the exact number.

Q. Well, is it a large number or a small number?

A. It is difficult to say; the term large is comparative.

Q. Was it more than five?

A. Yes.

Q. Was it more than ten?

A. Yes.

Q. Was it more than fifteen?

A. No, I think not.

Q. Did you go on those ships in connection with this case?

A. No.

Q. Has Mr. Jones taken you aboard any ships?

A. No.

[fol. 170] Q. You are not a ship surveyor, are you?

A. No.

Q. Do you know anything particularly about ships, their construction, their operation?

A. I don't know just what you mean by particularly; I am not an engineer, I am not a ship engineer.

Q. Nor a ship surveyor?

A. No.

Q. Have you ever surveyed any ship?

A. No.

Q. Have you ever been called in by ship owners on consultation?

A. Yes.

Q. When?

A. In the case of a fire in the coal bunkers on the Panama Pacific Line, I was called by the owners of the vessel to investigate a case of fire in the bunkers.

Q. What was the name of the ship?

A. I can't remember the name of the ship.

Q. Where was she?

A. Lying in New York Harbor.

Q. What pier?

A. I can't remember that.

Q. You don't remember the name of the ship?

A. No.

Q. That is the only fire you ever investigated on a ship, isn't it?

A. The only one I was directly connected with.

Q. And you don't remember the name of the ship?

A. I will not be positive as to that, but it is my recollection it was the "Cristobel".

Q. You said it was the Panama Pacific Line?

A. Yes.

Q. Do you say the "Cristobel" is a Panama Pacific Line ship?

A. I won't be positive of that.

Q. You were consulted by the owners. What was the name of the owners?

A. It was either the Panama Pacific Line or the Panama Railroad and Steamship Company. It was some years ago; the exact name of the company has left my memory.

[fol. 171] Q. Now, the cause of that fire, as you stated yesterday, was the fact that some hot ashes—correct me, I don't want to misquote you at any time, Doctor, and if I say anything that is not in accordance with your recollec-

tion, will you correct me—you said yesterday the cause of the fire, as determined by yourself, was that some hot ashes were put on the other side of the steel bulkhead that separated the coal from the ashes?

A. That was one of the causes.

Q. Now, proximity to heat is one of the most common causes of spontaneous combustion in coal?

A. That is one of the causes, I will not say it is one of the most common.

Q. Now, in this power plant that you mentioned, the proximity of heat in that case was a cause of that fire, was it not?

A. I don't know just which case you are referring to; I have investigated a great many in power plants.

Q. I am talking about the one you testified to yesterday.

A. I don't think I referred to any one particular case yesterday.

Q. Yes. Yesterday you said "one case, if I may go into detail here, in New York, a large power station, New York City power plant, where the bunkers for the boilers were over the boilers and the gates at the bottom of the hopper shed bunker were in some cases not entirely closed, allowing a slow seepage of air through the opening at the bottom of this hopper." Do you remember that?

A. Yes, that was one out of several which I have investigated.

Q. There you mentioned heat, didn't you?

A. Yes.

Q. Did you mention any case yesterday in which heat was not involved?

A. I think I did not mention any yesterday.

[fol. 172] Q. You didn't mention heat in connection with this case under discussion here, did you, that is, proximity to outside heat?

A. You are referring to the case of the "Galileo"?

Q. Yes.

A. I don't remember whether I mentioned that in my testimony or not.

Q. Well, was it a contributing factor?

A. I don't know.

Q. You went over the ship's plan carefully with Mr. Jones; did you have any heat that was proximately near this coal, like boilers or steam pipes or hot ashes, or any of the things that you have described, in your experience?

A. Well, it is a difficult thing to say definitely, but I believe it is within the point of possibility that it might have been communicated to that coal from the boiler room space.

Q. How far do you think this place was from the boiler room?

A. I don't know exactly.

Q. And yet you are willing to say, not knowing that, that the boiler room might have been a contributing cause?

A. I know approximately from the sketches that have been submitted.

Q. How far was it?

A. Approximately, I should say, I should judge from the drawings it was between 20 and 50 feet horizontally from the boiler room compartment.

Q. Now, am I right that one of the most common producing causes of spontaneous combustion is proximity to outside heat?

A. No, I would say you are not, that it was one of the most common.

Q. Is it a common cause?

A. It is difficult to answer that without knowing what you mean by common; I think one of the causes.

Q. Well, there are a number of fires in ship's bunkers [fol. 173] that you have heard about, aren't there?

A. Oh, yes.

Q. Don't the authorities agree that those fires usually occur near heated parts of the ship?

A. No, they do not, to my knowledge.

Q. That subject was not mentioned?

A. They do not agree that it is one of the most common causes, no.

Q. Well, don't they agree that it is one of the common causes?

A. No, I think not.

Q. Is it an unusual cause?

A. It is a cause that is known to influence the starting of fire.

Q. Now, in this case that you have given us—the two cases that you have given us, one of the producing causes was outside heat, wasn't it, the power plant, and the hot ashes on the other side of the bunker?

A. One of the two cases I have mentioned that is true, but there are many other cases which I have investigated

where there was no heat involved, and in fact, I have known by a study of the matter of some hundreds of cases, more than a majority of the cases investigated, where no heat could have been involved from outside sources. I remember the study of a report of the British Board of Trade of 114 cases of fires on shipboard that took place in one year, from the actual reports of the masters of the vessels involved, and it is my recollection that in not more than three or four of those 114 cases was there any chance of outside heating, exterior source of heat.

Q. Now, in this particular case, that is, the "Galileo", do you name in addition to the three other producing causes that you mentioned yesterday heat, or may we disregard heat in this case, outside heat?

A. In this "Galileo" case?

[fol. 174] Q. Yes.

A. I think there is a possibility that it may have played some part, a small part, perhaps, in this case.

Q. Where did that come from?

A. From the boiler room, possibly.

Q. Well, where else might it come from?

A. There is a possibility that the old coal which had been left in the bunkers was somewhat warm, due to the warm weather——

Mr. Keating: I ask that that answer be stricken out, because I asked him about heat outside of the coal; we are dealing with outside heat.

The Court: I will let the record stand as it is.

Exception.

Q. Where else, other than from the boilers, could outside heat have got into either pile of coal on this ship?

A. This loading, as I understand the bunkering of coal, took place in the summer time, in the hot weather, and the steel sides of the ship were undoubtedly warm from the sun's rays; that heat of the sun might very well have been communicated to the interior bunkers through the steel bulkheads and the deck.

Q. Suppose I tell you that the average temperature during that period was 73 degrees, would your answer be the same?

A. Yes; heat of 73 degrees would be a serious factor, and besides that the heat of the sun playing upon a steel deck can raise the temperature higher than the temperature of the air.

Q. Now, what other special case of a ship other than this "Cristobel" did you personally investigate, you per-
[fol. 175] sonally?

A. I have no other in my memory just now; I won't say, however, that I have not investigated other cases.

Q. Hasn't your experience been mainly with shore situations?

A. Mainly, yes.

Q. Now, I have a note here, Dr. Porter, that you said that the purpose of surface ventilation was to cool the surface; am I right about that?—and I am talking about the surface ventilation of coal in confined spaces, not in the great outdoors.

A. That is one purpose of surface ventilation, yes.

Q. What is the other purpose?

A. The other is to clear the space from gases liberated from the coal, which would be a danger of explosion.

Q. To get rid of marsh gas, is that the idea?

A. Yes.

Q. Now, would you approve, Dr. Porter, of a ventilator, the surface of which, where it led out of the between decks, was the length of the compartment multiplied by the breadth of the compartment and divided by 1500?

A. I can't answer that, not being qualified as an expert in ship construction.

Q. Would you criticize ventilators the total surface area of which, where they led out of the between decks, exceeded the length of the compartment by the breadth of the compartment and divided by 1500?

A. No, I would not criticize it, not being qualified.

Q. Have you ever heard of that formula, Doctor?

A. No.

Q. Mr. Jones introduced in evidence here as Exhibit 16 a copy of the report of the Chief Surveyor of Lloyds Register of Shipping. You have read that document?

A. Yes.

Q. You read it a few days ago, didn't you, when Mr. [fol. 176] Jones got it from Lloyds?

A. Yes, and I have read it before.

Mr. Jones: I got it because Dr. Porter called it to my attention.

Mr. Keating: I don't think we need any such references.

Q. Page 16: "The surface ventilation now always provided, if the cowls are properly attended to, is a safeguard against the accumulation above the coal of marsh gas or other inflammable gases evolved from the coal, and that consequent risk of explosion; but it is a question whether this ventilation, supplemented as it frequently is by the opening of the hatches in fine weather, does not aid in producing heating of the coal and the risk of spontaneous combustion, by supplying to the body of the coal the limited quantity of air necessary to permit of the slow absorption of oxygen, which is the cause of the heating of the coals." Do you agree with that statement?

A. I agree that there is some question about it, yes, but I would say that if surface ventilation is properly carried out with a large enough volume of air and large enough space——

Q. Do you think they ought to have electric fans in there——

A. There is very little chance of its being effective.

Q. Is not the main purpose of the surface ventilation of coal in confined places to get rid of marsh gas?

A. I think not; from my experience the main purpose would be to keep the surface of the coal cool.

By the Court:

Q. Would you explain to me why it is important to have [fol. 177] the surface of the coal cool, cooler than the inside?

A. To carry away, your Honor, the heat which is slowly formed by oxidation of the coal; if the heat were not carried away from the surface the temperature of the coal would slowly rise until the point of burning is reached, just under the surface.

Q. Then the purpose is to make the interior of the coal

cooler—by cooling the surface you thereby tend to keep down the temperature of the interior?

A. Yes, for a short distance under the surface.

Q. Only for a short distance?

A. Yes, the conductivity of coal to heat is slow; it is a poor conductor of heat. The cooling effect on the surface cannot go very deep into coal because of the fact that coal is a poor conductor.

Q. Then why is it important to cool the surface if the middle part of your coal is unaffected, so far as temperature is concerned, by the cooling of the surface?

A. Because, your Honor, the proper way to store coal is to keep out any excess of air underneath, what is called through ventilation; therefore, there would be no accumulation of heat if properly stored underneath. But there is a slight development of heat on the surface, due to the action of the air at the surface.

Q. Oh, it is your thought that the surface would become warmer than the interior if coal were properly stored?

A. Yes, if there were not a large supply or a large current of air over the surface to keep it cool.

Q. Yes, I understand.

By Mr. Keating:

Q. Now, that paragraph I read to you a moment ago [fol. 178] contains this statement: "It would be safer"—and I am reading from Exhibit 16 of Lloyds report—"It would be safer as regards heating if M. Fayol's suggestion of hermetically sealing the holds could be carried out, arranging, however, provision for the escape of the marsh gas evolved during the voyage. If this method could be adopted care would have to be taken to thoroughly ventilate the surface and the vacant spaces in the holds before discharging the cargo. Also as the holds would soon become full of gas in all the interstitial spaces between the pieces of coal, special attention would have to be given to prevent leakage of dangerous gas through sounding pipes, bilge and deck pump suction pipes, &c. The care necessary, however, would not be greater than that habitually given to such matters in the cases of vessels carrying petroleum in bulk." Do you agree with that statement?

A. I agree with most of it, yes.

Q. Do you agree with that statement, that the best way would be to hermetically seal the coal; that is M. Fayol's suggestion?

A. I think it would be an effective way if it could be accomplished, the hermetically sealing; it is not a very practical matter, however.

Q. If that is true, then, what has surface ventilation got to do with it? For if it is hermetically sealed, there certainly would be no surface ventilation.

A. Surface ventilation is provided to take care of cases where hermetically sealing the bunker is not accomplished. If you had hermetically sealed bunkers it is very likely that fires would not occur from the action of the air at the surface.

Q. Do you know in your experience of any hermetically [fol. 179] sealed bunkers on a ship?

A. No, I do not; meaning by hermetically sealed the absolute exclusion of air?

Q. Right.

A. As in a chemical laboratory?

Q. Yes.

A. I do not know of any of that kind.

Q. Do you consider that practicable on board ship?

A. Interpreting the word "hermetically" as you just now used it, I wouldn't consider that practical, no.

Q. So you would always expect some air in a ship's bunker?

A. Well, that has to be qualified. Your question——

Q. Well, you are an expert, qualified; go ahead.

A. I have to understand your question thoroughly.

Q. Well, I will ask you, and if I don't speak plainly, I wish you would tell me: Do you know of any ship's bunker in your great experience that hasn't got some air—which I understand is H_2O—and that is about all I know about it——

Mr. Jones: H_2O?

Mr. Keating: I don't even know that, so I had just better stick to what I do know.

A. Your question was do I know of any ship's bunker in which there was no air?

Q. Yes.

A. I know of piles of coal, stock piles of coal, in which the air has been completely exhausted.

Q. I am talking about ships, not piles of coal; I am talking about ship's bunkers. First of all, do you understand the question that I have asked you?

A. Yes, I think I do.

Q. Well, then, please answer it.

A. I have not personally tested any ship's bunkers to try [fol. 180] to find by experiment that they were absolutely free of air.

Q. What you mean is that you have never been in an hermetically sealed bunker, is that right?

A. Yes.

Q. Dr. Porter, you testified yesterday about certain general knowledge in possession of ship owners on the subject of coal. Do you recall that testimony?

A. Yes.

Q. Do you know Mr. H. H. Stoek?

A. He is dead now; I used to know him very well.

Q. Have you read his pamphlet entitled "Fires in Steamship Bunker and Cargo Coal", issued by the Department of the Interior?

A. Oh, yes, yes.

Q. In making your statement that these matters were well known, did you base your statement at least partly on these pamphlets that have been issued?

A. Well, Professor Stoek's pamphlet is a compend of information he has gained from consulting a great many other authorities, and shipping men, and Lloyds Agency, and the British Board of Trade, and various other sources of information, and he has put them all together in a very convenient and impressive form, but his pamphlet is not based on any actual work of his own, experimental work.

Q. He was designated by the Department of the Interior to make this investigation, wasn't he?

A. Yes.

Q. I want to read you from page 26 of Mr. Stoek's report, "Spontaneous Combustion". "Although many of the principles underlying the spontaneous combustion of coal are shown by the preceding reports to have been formulated at various times during the past 30 years and by a number of different boards and committees, it is quite [fol. 181] evident that comparatively few of these connected

with the shipping industry have become conversant with them." Would you say that Mr. Stoek, after he had made that investigation, was in error in making that statement?

A. No, I would not say he was in error; he may have been misinformed as to the prevailing knowledge among shipping men on that subject. I wouldn't go as far as to say that he had made an error in his statement.

Q. May I take it that you are right that there is general knowledge and that Mr. Stoek, who was appointed by the Department of the Interior to make a special study of the subject, was at least wrong on the subject of spontaneous combustion?

A. I beg your pardon; was that a question?

Q. Well, I thought it was. Will you read it? (To the stenographer.)

(Question read by the stenographer.)

A. This pamphlet was written a number of years ago and the general——

Q. When?

A. I don't remember the date, but it was at least 4 or 5 years ago.

Q. Has knowledge progressed very rapidly since then?

A. Yes.

Q. Since you have started your investigation?

A. No, I wouldn't say that. There have been a number of reports issued, however, in Great Britain, in England, on Spontaneous Combustion in Cargoes——

Q. I am asking you a question. May I have the question read again? (To the stenographer.)

(Question read by the stenographer.)

[fol. 182] A. I can't answer that definitely until you explain what you mean by general knowledge.

Q. Well, you testified yesterday that there was general knowledge among the shipping industry on the subject of spontaneous coal and the various factors that you suggested as being very dangerous; am I right about that?

A. That is my recollection, yes.

Q. Now I ask you whether Mr. Stoek in 1923, when he said there was not such general knowledge was in error or not?

A. I don't believe Professor Stoek said that there was a lack of general knowledge among all shipping men.

Q. Well, let me read you again what he said: "Although many of the principles underlying the spontaneous combustion of coal are shown by the preceding reports to have been formulated at various times during the past 30 years and by a number of different boards and committees, it is quite evident that comparatively few of these connected with the shipping industry have become conversant with them."

A. Well, the term "comparatively few" is an indefinite one; he might have meant compared to the stowage of coal on land.

Q. Now, Dr. Porter, ship owners don't operate ships on land.

A. No; you misunderstood me, I think. I said compared to the general knowledge there is among people who store coal on land, the knowledge among ship owners may have been in his opinion comparatively little.

Q. Well, he says so, doesn't he?

A. He says so, yes.

Q. Now, just tell the Court on what you base your statement that this general knowledge which you say exists on land also exists among ship owners?

A. I based that partly on reports of the British Board [fol. 183] of Trade and Lloyds, which have been spread quite generally among shipping men, shipping interests, and on quoted reports of masters of vessels in which fires have occurred in which they admit that it was spontaneous combustion. The immediate case in hand, the report of the master of the "Galileo", was spontaneous combustion. He thought of it immediately when he saw the smoke coming from the ventilator. Apparently from his report he knew it was spontaneous combustion when he first saw the smoke. He took steps then to shut out all air from the coal bunkers, compartments, knowing apparently in his general knowledge as a shipping man that the accession of air to the under parts of the coal was a dangerous factor, and he closed the ventilators and hatches, and shut out the air as quick as he could. That I get from the reading of the master's report of this fire.

Q. And you are willing to say from the master's report that he says it was spontaneous combustion, that it was general knowledge of the shipping world?

A. From that and other reports of masters of ships in which fires occurred.

Q. Have you found the masters of ships thoroughly informed on the subject of spontaneous combustion in coal?

A. They have known quite generally of the dangers from it, and that it was a common occurrence; in fact, the one I spoke of in which I made an investigation, on the "Christobel,"—as I remember the name of the vessel,—they sent for me, particularly the owners and shipping interests sent for me at the Government's Bureau, knowing that I had studied spontaneous combustion. They immediately came to the conclusion, when the fire occurred in the coal bunkers, [fol. 184] that it must have started from the spontaneous combustion of coal.

Q. Isn't that what everybody thinks when there is a fire from coal, in your experience?

A. No, I wouldn't say everybody, no.

Q. Well, when fire occurs in coal isn't that the common assumption that is made, that it is due to spontaneous combustion?

A. It is a frequent assumption, but it is also the fact that a spark from a locomotive dropped into the coal will start a fire.

Q. What you mean is that the general assumption that it is due to spontaneous combustion is frequently wrong?

A. No, I don't mean that.

Q. It is frequently wrong?

A. No.

Q. It is always right?

A. No, it is not always right.

(Mr. Keating asks counsel for the photographs, the exhibits in this case, and then asks the Court to direct that counsel produce the photographs in this case.)

Mr. Ryan: We have them with the papers in the case, your Honor, and we neglected to bring them, but we have copies of them.

The Court: Well, use them. I suppose it would be inconvenient to identify these on the record, so just withhold that part of the examination until they come here.

Mr. Ryan: I thought those were the ones, your Honor, that were marked as exhibits.

The Court: Well, we all make mistakes.

Q. Dr. Porter, when you were talking about restricted ventilation, which you gave as one of the three producing [fol. 185] causes, what were the factors that you had in mind as making for restricted ventilation?

A. The factors are many that make for restricted ventilation.

Q. I only want those that you have considered.

A. The access of air, not necessarily by forced draft or pulling of air through the lower part of the coal, but simply free access of air to filter in or flow in to the under parts of a pile in a bunker or in a stock pile on land, is always considered a dangerous factor, the mere allowing of air to seep in the under part of the pile. Now I can give a detail as to practice——

Q. I don't want that——

A. —of rolling, stamping or putting a steam roller on a coal pile; that is done in many cases; the Philadelphia Electric Company, I know in the storing of coal rolls——

Mr. Keating: I object. I have asked this witness what factors he took into consideration.

The Court: He was elaborating.

Mr. Keating: I want on the "Galileo", not all these other things.

The Court: You didn't confine your question to the "Galileo".

Mr. Keating: Yes, I did. I will make that a question.

Mr. Jones: Will you withdraw the question put before and put a new one?

Mr. Keating: Yes.

Q. What factors did you take into consideration, physical factors did you take into consideration, in making your statement that there was restricted ventilation in No. 3 between decks on the steamer "Galileo"? I want just the [fol. 186] names of the factors and not an explanation of why they are so.

A. As I understand the question, you want me to state why I consider that there was restricted ventilation in the between deck spaces?

Q. Not at all. I want to know what factors you took into consideration, the coal, to give you an illustration, the coal, the bulkhead, and anything else that you took into consideration?

A. I don't get the meaning of the term "factors" in the way you use it. Factors mean an agency causing something, as I understand it; as you use the term "factors" there, I suppose you mean what caused the restricted ventilation on the "Galileo" through this bunker, is that right?

Q. All right, doctor; if you can't answer it, I will let it go.

Mr. Jones: If your Honor pleases, the witness can answer it.

The Court: Strike the statement out.

Q. You can't answer my question in the way I put it?

A. No, I don't understand it. I am not trying to evade the question.

Q. I have not said you were.

A. I will answer the question if you will explain what the terms mean in your question.

Q. Doctor, one of the things that you took into consideration in connection with your statement about restricted ventilation was the bulkhead, was it not?

A. Yes.

Q. That was one of the principal things, was it not?

A. Yes, one of the principal things.

Q. Now, the condition of that bulkhead was important, wasn't it?

A. Yes.

Q. Now, when you were handed up a bunch of photo- [fol. 187] graphs you were handed, among others, Exhibit 7. You will recall that you testified, that part of your answer was based on an examination of the bulkhead shown in that picture. Now I ask you, doctor, wasn't it in your mind when you answered the question that way and referred to that photograph, that you were judging the character of the bulkhead from that picture?

Mr. Jones: As your Honor will recall and the record will show, Mr. Keating objected to that form of answer on the part of the doctor and moved to strike it out, and then I asked the doctor specifically to disregard what he had

heard the surveyor testify to, and confine his testimony to the information which I gave him in the hypothetical question and to take into consideration the fact that the bulkhead was——

The Court: Mr. Jones, this is proper cross examination, to see whether he has done it or not. He can test out this man's thought upon every one of the questions.

Mr. Jones: I think Mr. Keating's statement of fact is not a correct statement of fact in connection with what the doctor said.

The Court: It is right in connection with the answer as first given, but the answer was subsequently modified.

(Question repeated by the stenographer.)

A. No, it was not.

Q. You didn't have in mind at all—it wasn't running in your mind at all that the bulkhead through which you [fol. 188] were describing the seepage of air was of the general character of the bulkhead shown in that Exhibit No. 7?

A. No.

Q. Well, why did you mention it?

A. I examined a number of photographs, there are other photographs as exhibits, and my idea of the character of the bulkheads in question was gained from another photograph, as well as this, and perhaps more than one other.

Q. Well, what do you mean by your statement that the character of the bulkhead was judged by pictures of other bulkheads as well as this? You are referring to Exhibit 7, are you?

A. Yes.

Q. You just told us that they didn't enter into youd mind at all?

A. Well, I mean by that that the idea I have gained of the ship's construction and the style of the bulkheads that were built—there are several of them, apparently—I saw in another photograph a different bulkhead from this.

Q. Do you tell the Court, Dr. Porter, that the form of bulkhead you were talking about was not judged at all from the photographs that you are holding in your hand?

A. Yes, I will say that.

Q. It was judged from the other photographs?

A. Yes.

Q. Show me which one.

A. Partly from the other photographs and from the descriptions that were read in the answers to interrogatories, or the surveyor's testimony. I can't remember just now which. There were other factors involved in the impression I gained of the bulkhead beside the photographs.

Q. Well, now, suppose you tell me what you think the bulkhead looked like, the bulkhead in No. 3, separating the coal from the cargo spaces.

[fol. 189] Mr. Jones: Which bulkhead are you referring to?

Mr. Keating: I just told him.

A. The bulkhead separating No. 3 between decks from the cargo spaces, as I understand you?

Q. Yes.

A. In my answer to this I don't want it understood that I consider that bulkhead alone was the one that influenced the cause of the starting of the fire.

Mr. Keating: I move to strike that out. I am asking him about the bulkheads, and he is starting to qualify about something else, and I am entitled to an answer. I ask that the answer be stricken out.

The Court: I will allow it to stand, with an exception to you. It is helpful to me to keep in mind just what he wants me to understand about it, and if he wants me to understand that that bulkhead was not the only place that he thinks air was seeping, I don't think that is objectionable.

Mr. Keating: It is objectionable if I am asking him about a bulkhead. I am trying to get from him a description of the bulkhead which he says was one of the principal factors. I can get to the other matters later. I am trying to find out from the witness what he says that bulkhead was like.

The Court: I am interested to hear what his idea is, also, and I didn't find it much of an obstacle. I will let it stand.

Q. Tell us what your idea of the bulkhead is.

A. My idea of the bulkhead between No. 3 lower between [fol. 190] deck space and the cargo space is that it is built in similar fashion to the one shown on the other side of the lower between decks space in one of the photographs.

Q. Which way was that built?

A. That was built of horizontal boards instead of vertical, as is shown in one of the other photographs, I think it is Exhibit 13, but I am not sure of that.

Q. May I take it that you assume that the bulkhead which we are talking about separating No. 3 from the cargo space was built of horizontal boards; is that correct?

A. I am assuming that, yes.

Q. Was that all, just the boards laid there, one on top of the other?

A. I can't say as to that. The photographs did not show any of that bulkhead remaining, that particular bulkhead between No. 3 space and the cargo space; it was burned out.

Q. Are you assuming that the bulkhead, before it was burned away, was horizontal layers of planks, one on top of the other, starting at the bottom and going up to the top of the next deck?

A. I am assuming that, but I have no direct proof of that.

Q. Now, are you assuming anything else on that bulkhead, are you assuming any covering or anything else, or is the description which you have just given us of horizontal planks, one on top of the other, the complete picture that you have in your mind of that bulkhead?

A. I am not assuming anything else as to its construction now except the testimony shows that there was a sill remaining at the bottom, the remains of a sill.

Q. Do you know what a dustproof bulkhead is?

A. Do I know what a dustproof bulkhead is?

[fol. 191] Q. Yes.

A. No; no, I do not.

Q. In considering this bulkhead that we have been talking about, have you assumed that this was a dustproof bulkhead?

A. No, I have not.

Q. Now, what have you assumed with respect to the coal that was on the No. 3 between deck side of the bulkhead?

A. I have concluded from the statements of the master of the vessel and the answers to interrogatories that 160 tons of old coal was left in the bunkers between decks, and that a large amount of new coal, fresh coal, was placed on top of it. That much is a conclusion from statements that have been presented.

Q. Now, have you assumed——

A. Excuse me, I haven't quite finished. Then I have assumed that this fresh coal was thrown in there, into that space, by shoveling, by men with shovels, and had been thrown on to more or less of a conical pile and the lumps had rolled down toward the bulkhead, accumulating some of the lump coal on the wooden bulkhead.

Q. You assume the fresh coal was against the bulkhead at the bottom?

A. Some of the fresh coal was against the bulkhead and possibly some of the old coal.

Q. And was the bulkhead entirely covered with coal on the after side of it?

A. I don't know as to that.

Q. Well, what did you assume?

A. There is no way of knowing. I assumed it was not entirely covered.

Q. How far up did you assume the covering went?

A. I didn't make any exact assumption as to the height.

Q. What did you assume was on the other side?

A. Cargo.

[fol. 192] Q. What kind of cargo?

A. It was stated in the interrogatories, I believe, that cases of lard, smelter bars, and slabs of zinc bars and smelter bars, or something of that sort, were there.

Q. Have you assumed that that cargo was against the bulkhead?

A. Not exactly; near it.

Q. How many ventilators did you assume were in the between decks?

A. Two; one on the starboard and one on the port.

Q. Are you sure of that?

A. That is my recollection of the testimony of the surveyors, and the sketches that were submitted.

Q. Do you mean to say that they showed No. 2?

A. I don't say positively that they did; that is my recollection.

Q. Now, where do you say the air would come from to get into No. 2—the air had to get into No. 2 between decks before it got into No. 3 between decks, did it not?

A. No, I won't say that; it might get in from other sources.

Q. Do you mean there were ocean breezes in the bottom of No. 2 between decks?

A. Not exactly ocean breezes, no.

Q. Do you mean there were some mild zephyrs down there?

A. I wouldn't call them that, no.

Q. Well, now, one thing is certain, that there had to be air in No. 2 between decks if any of it was to go through that crack in the bulkhead and into the coal, isn't that so?

A. No, I don't say that is certain; I wouldn't say that is certain at all. Air might get in there from other sources.

Q. Air get into where from other sources?

A. Into the coal in the lower No. 3 between decks.

Q. Now, I am only talking about the bulkhead at the moment. In order to go through the bulkhead between No. [fol. 193] 2 and No. 3 between decks, didn't there have to be some air in No. 2 first?

A. Oh, yes; yes, I will admit that.

Q. Now, where do you say that air came from in the No. 2? How did it get into No. 2, and what was propelling it into No. 3?

A. It didn't need any propelling; it simply needed to drift or filter through as the oxygen in the air in contact with the coal was exhausted; naturally to fill the void there the air would be slowly drawn through to replace what oxygen had been absorbed in the coal. Now, the air may have come down through the ventilators; it may have come from other parts of the ship.

Q. Down through the surface, down through the insulation, down into the bottom of the pile through the ventilators?

A. No, not down in the bottom of the coal directly from the ventilator, but you were asking me where the air in No. 2 cargo space came from. There was no coal in No. 2 cargo space. The air in that space may have come down through the ventilator into No. 2; it may have come from other parts of the ship. It wasn't necessary to have a rapid violent current of air sweep down there; it is simply drawn in by the natural draft, so to speak. It may have been a very slow diffusion.

Q. Now, so far as the restricted ventilation in No. 3 between decks is concerned, do you consider that most of the air that you claim got in there, or which got in there, came through the bulkhead?

A. Most of it came through the bulkhead, yes.

Q. Now, the amount that would come through the bulkhead does depend on the character of the bulkhead, does it not?

A. Yes.

Q. The larger the openings, the more air, is that right?

A. Yes.

[fol. 194] Q. And the smaller the openings the less air?

A. Yes.

Q. Also, the amount of draft has something to do with it, doesn't it?

A. Not very much, no.

Q. Now, how long are you assuming, in answer to these questions, that this restricted ventilation took place?

A. The restricted ventilation through the new stock of coal took place only during two days, from August 26th, when it was put on board, until August 28th, when the fire was discovered. But the restricted ventilation through the old supply of coal which possibly lay against the lower part of the bulkhead was taking place during the whole two months of the preceding voyage.

Q. In making that statement just now, when do you say that the hatch covers were put on the main deck?

A. I don't know when they were put on; I am not considering anything about that.

Q. That has nothing to do with restricted ventilation, in your consideration?

A. It may have something to do with it.

Q. Have you considered it?

A. No, I have not.

Q. This is the first time you have thought of it?

A. No, I will not say that. I knew there were such things as hatches and hatch covers and that there were probably some of them put on again in this case.

Q. Now, if the hatch covers had been off up to the morning they sailed, on the main deck, would you say that that place had been under restricted ventilation for two days, No. 3 between decks?

A. Which hatches are you referring to?

[fol. 195] Q. Main deck hatches.

A. No. 2 or 3?

Q. No. 3.

A. Now, your question is whether I would consider that had any effect on the restricted ventilation, is that right?

Q. Yes.

A. I would consider there was a possibility it might have some effect, perhaps not large.

Q. Doctor, do you take the flat position that fresh coal should never be put on coal that has been in a ship when the fresh coal is put in? Do you take that flat position?

A. Yes, I consider that a dangerous practice.

Q. You say that if a ship has any coal in her, irrespective of the time when it is put in, the old coal, she should not take on fresh coal on top of that what you would call the old coal, is that right?

A. Yes, that is right, unless the old coal remaining in the bunker is pulled forward so it can be used before the new coal can be worked out, in the beginning of the voyage, and used first.

Q. Let me get that straight. In other words, before you should take on fresh coal on top of old coal you ought to trim the old coal into position so it will be used before the fresh coal?

A. So it will be used quickly, at the beginning of the voyage.

Q. Well, then, you don't disapprove flatly of loading the new coal on top of the old coal, providing you can so arrange your space as to get rid of the old coal quickly? Have I stated that correctly?

A. I think it is a dangerous practice to put new coal on top of old coal.

Q. Won't you please answer my question?

A. Yes, I will, if I get the question.

Q. Well, read it to him.

(Question repeated by the stenographer.)

[fol. 196] A. No, I don't disapprove flatly, provided you can get rid of the old coal very quickly after starting the voyage.

Q. In other words, you think that the old coal ought to be put in a position to be used first?

A. Yes. In fact, that recommendation is made by shipping interests; in the reports on dangers from spontaneous fires in bunkers there is a recommendation specifically by boards of surveyors who have investigated cases, the Board of Trade of London, they have made that recommendation,

to pull the old coal forward and use it immediately, before the new coal.

Q. Well, of course "immediately" is a relative term; they can't use it all in the first day out if there is any amount of coal left, you realize that, don't you?

A. Oh, yes, yes, but it should be pulled forward, out from under the new supply of coal.

Q. How are you going to put fresh coal on top of it, then? Doctor, you told me, as I understood you, that you didn't object flatly to the storing of new coal on old coal, provided the old coal was trimmed forward so it could be used before the fresh coal; am I right about that?

A. No, I said more than that; that is not a complete statement of my answer.

Q. What else did you say?

A. I said provided it could be used very quickly after leaving port.

By the Court:

Q. What do you mean by "very quickly"? Within a day, an hour or a week?

A. Within a day, providing it can be gotten out from under the new supply of coal, within a day.

[fol. 197] By Mr. Keating:

Q. Will you point to me in any book in the world, or any authority where that recommendation is made?

A. Not where it is stated in one day.

Q. Nor two days either. Point to me to any place in the text book or any authority in the world that makes the statement that new coal, when it is loaded on old coal—that the old coal can be worked out in one day. I defy you to do that, Doctor.

Mr. Jones: I object.

The Court: Strike that out. Ask him some question.

Q. Point to me, Doctor, any text book, any authority whose written work makes the statement that you have made on the stand here on this subject.

A. Is this a question?

Q. Yes.

A. Well, I will point, if you will allow me to have the literature on the subject. I will point to the recommenda-

tion stating specifically that old coal must be trimmed forward and used.

Q. Before the new coal——

A. Before the new supply of coal.

Q. I agree you can find such statement. But I am asking you to point to me one statement in line with his Honor's statement of any authority which says that when new coal is loaded in connection with old coal, that the fresh coal should be set in such a position that the old coal shall be used up in one day; can you do that?

A. You want me to point it out in print?

Q. Yes.

A. I say I cannot, and you asked me——

[fol. 198] Q. Can you point me to such a thing?

A. I thought you meant the question to say "will you". If you said "can", I say no, I can't.

Q. Can you point to me any authority which says that you must use the old coal up in two days?

A. No.

Q. Three days?

A. No.

Q. Four days?

A. No.

Q. Five days?

A. No.

Q. Six days?

A. I can't point to any specific time, if that will save your questions.

Q. Right. Now, you know perfectly well, don't you, Doctor, that it is common practice in the steamship business to carry new coal on the old coal if the old coal is to be worked out in a short time?

A. No, I don't know that.

Q. Would you say that it isn't so?

A. No, I wouldn't go so far as to say that, either.

Q. Now, Doctor, would you favor a steamer which came in with some coal that was say two months old and showed no signs of heating or giving out gases—would you recommend to the ship owner to throw that coal away?

A. That depends entirely on what you mean by showing signs of heating. If you mean by going down in the bunker and placing your hand on the surface of the coal to determine whether you felt any heat on the surface, I should

say that is not a sufficient indication of whether the coal is heating.

Q. Well, let us assume, first of all, that the most critical examination of the coal that could be made by you, of the old coal, showed no signs of heat, and you were called in on consultation with the ship owners, and asked whether you should throw that coal away, would you recommend to the ship owner that he throw it away?

[fol. 199] A. I would recommend that he draw it forward so it could be used within a very short time after leaving port, even though it had showed no signs of heating to such examination as could be given.

Q. Now, Doctor, suppose the coal was actually hot, the old coal in No. 3 between decks, what should be done to that old coal before they put in the new coal—suppose that it is so hot that it burned the men's boots that were trimming it, what ought to be done with that coal? Ought there to be any fresh coal put in there?

A. No, there ought not to be any fresh coal put on top of that, certainly.

Q. It should have been taken out of the ship, shouldn't it?

A. It should have been put on the deck where it could cool off.

Q. Is there any question about that, Doctor?

A. No, certainly not.

Mr. Jones: Mr. Keating has cross examined Dr. Porter with respect to a pamphlet, I believe he called it Fires in Steamship Bunkers and Cargo Coal. May I see that?

Mr. Keating: Certainly.

Mr. Jones: I offer it in evidence.

(No objection.)

(The pamphlet is marked Libelant's Exhibit 19 in evidence.)

Redirect examination.

By Mr. Jones:

Q. Mr. Keating has directed your attention to a paragraph in Mr. Stoek's pamphlet, which appears on page 3, in which Mr. Stoek says: 'Scant information regarding coal fires on vessels can be obtained from vessel owners,

[fol. 200] marine agents, insurance and cargo adjusters and surveyors, and coal shippers." I direct your attention to Mr. Stoek's pamphlet on page 44, and I will read you what is stated here, and ask you if these statements are some of the things which you had in mind when you stated the subject was generally known to ship owners.

Mr. Keating: I object, that this is not proper re-direct examination. I object to Mr. Jones suggesting to this witness what he had in mind about general knowledge, and I suggest that Mr. Jones do not lead the doctor.

Mr. Jones: I will ask the doctor to look at——

Mr. Keating: I object.

Mr. Jones: I am within my rights in requesting to be allowed to finish my question without any objection.

The Court: Go ahead.

Q. I ask the doctor to look at Exhibit 19 and designate to the Court what passages, if any——

Mr. Keating: I don't want this man to look at the pages until I have an opportunity to object.

Q. In this book you had in mind when you made your statement with respect to the general knowledge of ship owners——

Mr. Keating: I object to that question as leading. If the witness can't state without looking at the book he [fol. 201] hasn't any right to state at all. Mr. Jones is suggesting to the witness that he look at the book and state what his views are on general knowledge. I object to it as improper and grossly leading.

Mr. Jones: Your Honor, Dr. Porter can show just what he based his knowledge on in regard to general knowledge in the shipping world, and I think your Honor would be convinced, and anybody would be convinced, after reading that.

Mr. Keating: The doctor is well able to take care of himself.

The Court: You cross examined him about his knowledge of the general knowledge in the shipping world as to these general conditions. I think it is permissible for him to show the full basis for his thinking.

Mr. Keating: I cross examined him on that book and asked him generally what he relied on—I asked him what

else he relied on. He didn't say what else he relied on, and Mr. Jones is suggesting that the doctor was a little weak, and he is getting him to read out of a pamphlet the things which he didn't tell me.

Mr. Jones: We are all anxious to get at the facts.

The Court: I sustain the objection in this particular case. I will permit you to ask this man whether he considered the statements your question assumes that he considered, the statement in this pamphlet. Now, that assumption is not justified. If you ask him whether he did consider it, thereafter we can get at the special parts.

[fol. 202] Mr. Jones: I will approach it in a little different way so it will be entirely unobjectionable to anybody.

Q. Please state the sources which you considered when you stated that the matter of placing new coal on old coal was a subject which should be known to all ship owners.

A. I remember very well reading this pamphlet of Prof. Stoek when it came out, because of my acquaintance with him and my interest in the subject, and I remember his referring in his pamphlet—I can't give you the exact pages without looking at it, but it is undoubtedly in there—his referring to the conclusions of a committee of Lloyds appointed to investigate spontaneous combustion on ships, also conclusions and recommendations by the British Board of Trade on the same subject, and he quoted those conclusions. The recommendations of the British Board of Trade were made a short time before the publication of this paper, and I had not seen them until I saw them in this paper; that was my first knowledge of them. They were made I think less than a year before this paper was issued, and Professor Stoek quoted them in here, and that was my first knowledge of this particular recommendation; but Lloyds Calendar had published some ten years before that, in 1912, their investigation on the same subject; and those are both referred to in this pamphlet.

Q. And were those the sources on which you based your statement as to the knowledge of this subject that it should be known to ship owners?

A. Yes; those were among the principal sources.

Q. Now, you were asked a number of questions by Mr. Keating as to ventilation. Will you say whether or not the [fol. 203] location of ventilators has any bearing on the subject of ventilation?

A. I am not qualified as a ship expert to answer that question exactly. I cannot say from my own experience that the location of a ventilator will have any large effect on the amount of air drawn through the coal. I would say in a general way, based on scientific or engineering knowledge, that it would not have a large effect.

Q. How about surface ventilation?

A. As to the effect of the ventilator on surface ventilation?

Q. Yes.

A. Well, I would think in that case, as applied to surface ventilation, that it would have some effect, that the ventilators should be placed right to draw the air properly over the surface of the coal.

Q. What do you mean by that?

A. It would be best, I should think, to be placed at one height of the space over the coal storage so as to draw the air over the entire surface as near as possible.

Q. Now, when Mr. Keating was questioning you you started to tell him about some bulkheads, and Mr. Keating then confined his question to one bulkhead. What bulkheads did you have in mind in giving us your answer as to the contributing causes for the fire?

A. I had in mind the two bulkheads, one aft and one forward of this between deck space where the fire originated.

Q. Now, Mr. Keating has asked you about the bulkhead and asked you to assume the method in which the bulkhead was constructed. I asked you now to assume anything with respect to how the bulkhead was constructed, but merely to assume that the bulkhead was not watertight, and I ask you under those circumstances to tell me whether or not you are in a position to express an opinion [fol. 204] as to the contributing cause of the fire?

A. Yes, I am in a position to express an opinion.

Q. What would your opinion be?

A. The opinion is that the bulkhead, the bulkhead in one case at least, at least one of these bulkheads was so constructed that air could penetrate through the crevices between the boards and through the burlap that had evidently been thrown over as a curtain. Now, the other bulkhead that was brought out before was destroyed by fire and we have no direct evidence, as far as I can see, that that par-

ticular bulkhead was constructed exactly in similar fashion to the one shown in the photograph.

Q. But I am asking you to disregard the method of its construction and simply assume that it was not watertight.

A. In that I should say that it was a factor in contributing to the fire.

Q. Why?

A. Because, if we assume the bulkhead was not watertight it was certainly not airtight, and that means that air could penetrate between the planks or in between crevices where water would penetrate; the bulkhead not being watertight it certainly allowed air to pass through.

Q. Then can you say whether or not it is material or immaterial whether the bulkhead is constructed of planks vertically or horizontally laid, or how it is built, provided the bulkhead is not airtight?

A. I should say it is immaterial.

Q. So the important factor then is what?

A. The filtration or penetration of air through the crevices in the bulkhead under the surface of the coal.

Q. In other words, that the bulkhead is not airtight?

A. Yes.

Q. Now, is it a material factor as to giving the exact [fol. 205] height of the coal in the bulkhead?

A. No, that is not material.

Q. You have been asked a great number of questions respecting what was published in books on this subject of old coal or new coal. Did you have in mind what was published by Lloyds on that subject?

Mr. Keating: I object to it as leading.

Mr. Jones: I don't want to lead him.

Q. What did you have in mind that was published on that subject, when you referred to the publications?

A. I had in mind the recommendations of Lloyds in their calendar, resulting from an investigation by a committee of Lloyds on the subject, and a report published by the surveyors of the Board of Trade of London on actual cases of fires during the years 1919 and 1920, on shipboard.

Q. What report was that?

A. I can't give you from memory the number of it, but it was published in 1921 by the British Stationery Office, His Majesty's Stationery Office, in London, a report of

surveyors of the British Board of Trade, outlining or reviewing 114 cases, if I am correct in my memory—114 cases of fires on shipboard during the years 1919 and 1920.

Q. Did any of these cases have anything to do with new coal on top of old coal?

A. Yes, they did.

Mr. Keating: I object to this man testifying as to the contents of the pamphlet.

Mr. Jones: You asked him if he had any authorities on the subject of old coal and new coal, and I want to bring [fol. 206] out what he knows about it.

Mr. Keating: I object as improper. I asked him if he could point to any authorities.

The Court: I sustain it.

Mr. Jones: You limited it to one day.

The Court: No, he didn't.

Mr. Keating: And he said he couldn't limit it.

Exception.

The Court: I give this assurance to either side, that wherever a formal objection is made there is deemed to be an exception in favor of the person ruled against.

Q. Now, Mr. Keating has asked you with respect to a number of questions about the old coal and new coal. I direct your attention to the hypothetical question which I read to you in the beginning, specifically to the master's report, in which the master stated that the new coal was placed on top of the old coal, and in his letter, which was written by the master to his owners shortly after he reached New York, the exact language being: "As No. 3 'tween deck and shelter deck was full of bunker coal shifted in New York during the week on top of about 160 tons of coal left from previous voyage, I came to the conclusion that spontaneous combustion had set fire to the bunkers and bulkhead between No. 2 and 3 'tween deck on the spar ceiling." I ask you whether under those circumstances you are in a position to say whether or not in your opinion that old coal had been properly trimmed in that compartment? [fol. 207] A. In my opinion it had not, no; according to the master's statement he placed the new coal on top of the old coal.

Q. And that is what you condemn?

A. I should condemn that as bad practice.

Q. You were asked a number of questions with respect to the time element in spontaneous combustion, and will you be good enough to tell me what you mean by the time element in spontaneous combustion?

A. As I remember the testimony given on that subject, the time element was brought in as a matter of estimation of an exact period of time within days or hours when a fire might be expected to break out, naming one or two conditions. Now, it is not practicable to set a time based on only one or two conditions in the coal stowage; it is necessary to know the full detail of all conditions pertaining there before anyone can even estimate approximately when the fire would be fairly certain to break out. However, one can say that there was great danger under certain conditions if even a few conditions are known. Now, with the conditions we have on this boat, the time element—you asked me to define what I mean by the time element—I would say that the time element in this particular case was fairly well defined by the number of conditions that were existent there.

Q. What conditions do you refer to?

A. The facility for penetration of air through the coal, through this bulkhead, from a cargo space which allowed air to enter freely on the other side of the bulkhead, and the presence of old coal underneath, which very likely it may have been cooled on the surface, was very likely warm or fairly hot down near the bottom, and the manner of loading the new coal on top of the old, so that lumps rolled next [fol. 208] to the bulkhead—all those conditions, particularly the penetration of air and the probability of some heat in the old coal, were bad, and would lead anyone who knew anything about stowing coal on ships, or spontaneous combustion on land, to expect a fire would break out in a short time. Now, the exact time element cannot be stated even in those circumstances within an hour or a day, but you can say that it was so dangerous a practice that there was every probability, and in all probability a fire would be likely to occur any time within—or it would be likely to occur in a time between one day and a month.

Recross-examination.

By Mr. Keating:

Q. Doctor, as I understood your answer to Mr. Jones, restricted ventilation in that hold didn't make any difference, whether you assumed there was a large hole or a large crack in the bulkhead, or whether it was a dustproof bulkhead, provided only that you assumed that it was not watertight; am I right?

A. No, I think not. I don't remember that my answer was as you have stated.

Q. Well, as I recall Mr. Jones' question a few moments ago, he asked you to disregard the construction of the bulkhead entirely, except that it was not watertight, and asked you whether anything else was material, and you answered no. Have I misquoted your answer?

A. No, I think that is correct.

Q. Is that still your answer?

A. Yes.

Q. In other words, it doesn't make any difference whether there is a large hole in the bulkhead at the bottom, [fol. 209] or a small hole, or whether the bulkhead is so constructed as a dustproof bulkhead, that very minute, if any, air can get into it?

A. No, I think you are leading a little too far away from my statement.

Q. Well, does it make any difference or not as to the amount of air that can get through the bulkhead?

A. Yes, the size of the holes makes a difference in the air.

Q. It makes a big difference, doesn't it?

A. Not when coal is piled against the bulkhead, no, I wouldn't say it makes a big difference, but when there is a pile of coal against one side of the bulkhead. The presence of a pile of coal or any solid material against that bulkhead would influence the passage of air through, and if it was a large hole the coal would be packed against that particular spot where the hole is, and it would then depend on how the air could penetrate through the coal. So beyond a certain limit the size of the opening, the holes in the bulkhead, would not make any great difference.

Adjourned until 2:15 P. M.

November 7, 1929—2 o'clock P. M.

S. W. PARR, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Prof. Parr, will you please give us an account of your education and your experience in connection with the study of coal.

[fol. 210] A. I studied at the University of Illinois, Cornell, and Berlin and Zurich, specializing in chemistry, and the chemistry of fuels. Since 1890 I have been professor of applied chemistry at the University of Illinois. My active work there in connection with fuels, began about 1896 or 1897. In the following years, bulletins to the number of five, I believe, were published pertaining to storage of coal and spontaneous combustion and matters of that type. The principal bulletin in that connection was published in 1912 and has been a rather standard of reference in the matter of contributing causes to spontaneous combustion, having been republished entire in the technical journals of England, Russia, and in this country, through a number of sources. I have been actually engaged in the study of fuels up to the present time.

Q. Are you a member of any chemical societies?

A. I am a member of the American Electro-Chemical Society; the American Society of Chemical Engineers; and the American Chemical Society.

Q. Have you been an officer in any of those societies?

A. I have. In 1928 I was president of the American Chemical Society.

Q. Are you connected with any journals dealing with coal?

A. I am associate editor of an English journal entitled "Fuel in Combustion and Practice". I am associate editor of a journal on "Fuel and Finance", published in New York. I am councillor having control of publication of the American Chemical Society.

Q. You were in court this morning when we referred to the pamphlet published by H. H. Stoek, when I found a

reference in that pamphlet to S. W. Parr, do you know if that is you that Mr. Stoek referred to?

A. It is.

[fol. 211] Mr. Jones: Following your Honor's suggestion, I shall not repeat verbatim the long hypothetical question that I put to Dr. Porter.

Q. And I will ask Prof. Parr if he was in court and heard the hypothetical question that I put to Dr. Porter at that time.

A. I did.

Q. I recall to you, Prof. Parr, that I asked Mr. Porter whether with all the facts stated in that hypothetical question before him, he was in a position to state what the contributing causes were to the fire which I described in that question; and I now ask you whether you are in a position to state what the contributing causes to the fire which I described in that question to Dr. Porter, were. Are you in a position to state—just yes or no?

A. Yes, I am.

Q. Will you be good enough to tell us what in your opinion was the contributing causes which occurred on the "Galileo", which I referred to in that question, keeping in mind that you are to base your opinion here on only the facts stated in the question. If you wish the question before you, and if you haven't it clearly in mind, I wish you would say so, so that we can refresh your recollection exactly.

A. As to all the facts that were in that question, first and foremost as an aid to making my mind up, I think I will say that heat is the result of chemical action; as a matter of fact, aside from friction, perhaps there is no heat generated that is not the result of chemical action. That is a fundamental and primary principle. I would say, then, because of that fact, if there was heat generated, there was chemical action going on. Now, the greatest source [fol. 212] of supply of chemical action that we have, is coal, and if, it has access to oxygen under proper conditions, we get heat, and we get this chemical action. The oxygen does not burn; it is the coal that burns. If we supply the oxygen to the coal under certain conditions, the inevitable result is heat.

Now, as I understand this interrogatory, there was heat. It is conceded there was heat evolved, generated. Then the only conclusion, the only obvious conclusion, is that there was chemical action somewhere; and the constituents entering into that reaction for the production of heat, might be the oxygen of the air supplying the action to the coal which generated the heat. Hence, if there was heat, my answer would be, obviously that there must have been some sort of chemical action.

Now, a contributing cause to chemical action of this sort would be quite a number of different conditions. First, the size of particles has a great deal to do with this action. That can be very well illustrated by supposing we have a lump of coal an inch square; there could be no chemical action started excepting on the surface of that lump of coal. If that lump of coal were crushed to fine particles, that surface would be multiplied a thousand times and these chances for chemical reaction would be multiplied a thousand times. Now, in a cube, the chemical reaction would be slow; that is, it would be inconspicuous, it would dissipate itself and the presence of heat would be so low that you might not detect it. Hence a contributing cause would be fineness of division.

[fol. 213] Q. May I interrupt you there for a moment: What is "run of mine coal," Prof. Parr?

A. A miner, when he loads out the room, cleans up the room with the sweepings, and everything that will add weight, because he is paid on a weight basis; and the cars coming out from his room, they will have all that he breaks down. Which is lump and fine stuff and mixed; that goes out, and without treatment, and without screening and without preparation in any way, into the shipping container, and is called "run of mine". Now, then, if that material has fine stuff in it, it is a contributing cause for this chemical reaction; and the lumps mixed in are a contributing cause, because they open up the space and admit of circulation of air; accessibility of air, then is a contributing cause, it must have access to the coal. So I would say that fineness or division, accessibility of oxygen, and temperature, is a very strong factor in bringing about or in speeding up this chemical reaction.

In a mass of coal, or any fine material, if it is at a certain temperature, the reaction will be a certain amount; if the

mass is at a higher temperature, the reaction will be correspondingly rapid. So that a contributing cause, if such a cause were present, would be the temperature of the mass, because that would be an acceleration of the reaction, if the temperature were high or low.

I think those are the main factors that enter into—that cover this matter of chemical reaction.

Humidity has something to do with it, the amount of moisture in the mass that is burning.

Temperature of ignition of one type of coal is higher than another. The temperature of ignition of anthracite is much [fol. 214] *m*igher than it is of bituminous coal. For bituminous coal it is much higher than for kindling wood. But the temperature at which an organic substance will burn, is the temperature at which it will continue to burn—the ignition temperature, I mean. Now, in the case of bituminous coals, it is not a very high temperature.

Q. What is the temperature of bituminous coal?

A. The older bituminous coals will take fire at about 400 degrees fahrenheit. The eastern bituminous coals will continue to burn if they are elevated to about 400 degrees. That is about the temperature of high pressure steam, provided only it has accessibility to oxygen. The younger bituminous coals of the mid-western field, have an ignition temperature, that is, a burning temperature, a starting temperature, of about 300 degrees. And so on down: Peet has a much lower point; certain types of wood, such as can occasionally be found in the forest, has still lower temperature of ignition; and so on through the list. The temperature of ignition is relatively low.

Q. Will you just continue answering the question, please, Prof. Parr? I want you to answer it in this way: Have you that hypothetical question in mind? I mean, to have you answer it without my interrupting you with questions, because I would like you to give your reasons to the Court.

A. Well, the fundamental reason, your Honor, is that here is evidently fire. There could be no fire unless the constituents for the chemical reaction were present: We assume the coal to have been there; there could not have been any fire without accessibility of oxygen. Now, the conditions governing the fire, are varied. They are not one thing, as I have already stated: Fineness of division, that is to [fol. 215] say, surface multiplication facilitates that action;

temperature facilitates it; accessibility of oxygen. Those are the main factors, together with a starting temperature. I think those are the factors, in my own mind, which enable me to say that I think I can give a reason for the contributing causes to the fire.

Q. Will you please state what reason you wish to give us, of the contributing causes—I want you to give us the contributing causes of the fire which I have described to you on the "Galileo".

A. It is a well known fact, and I have carried out many experiments verifying the fact, that freshly mined coal has a tremendous avidity for oxygen. For example, I have data of this sort: I took freshly mined coal and sealed it up in a jar with half the space filled with air and half the space fil-ed with coal, and after 24 hours I withdraw the air and analyze it. There is absolutely no oxygen left in that enclosed space, because of the avidity of the fresh coal for oxygen; it has created a vacuum to the extent of its removal of the oxygen from the air that was enclosed in that vessel. About one-fifth of the space is oxygen in the air; the other four-fifths being nitrogen, which the coal does not have any avidity for; it selects the oxygen and absorbs it. Very well; now, I open the jar to get the sample and allow it to fill itself wi-h fresh air, seal it again, and after 24 hours expire, the same thing has happened; the coal has the avidity for the oxygen to such an extent that it has absorbed all of it from the air. And in my experience, that can be repeated five or six or seven or eight days, for about seven times the volume of the coal will be absorbed as oxygen. Now, then, that established in our studies on storage of coal, a very important factor, and that is:

[fol. 216] Freshly mined coal having such an avidity for oxygen, must be so stored that either the heat that is generated in that process will be dissipated and the temperature kept down, or such a limited supply of oxygen can have access to the coal that this heat will not bring it up to the ignition temperature.

Now, then, there are other factors that enter into the case, and this peculiar property, which is recognized everywhere and well established for absorption of oxygen by freshly mined coal, it is very well known and very well established and must be considered where coal is stored or stacked in any form.

The Court: By "absorption", you mean the physical absorption?

The Witness: It starts out as a physical absorption, but it is a chemical union with the coal; the coal takes it up somewhat in the nature of a sponge taking up water; the water has been taken up, has been absorbed by the sponge. Now, the coal takes up oxygen in somewhat similar manner, though it is more of a chemical combination than a purely physical combination. The coal takes up the oxygen as a chemical—what the chemist calls a chemical complex; it does not increase the bulk of the coal, but it has taken up and holds this oxygen chemically, and in doing that a certain amount of heat is generated, and, just like any other—there can be no chemical reaction without heat, so just in proportion as the coal absorbs this oxygen, there is heat generated; it may be very low temperature, or very high.

[fol. 217] Q. Now I direct your attention, Prof. Parr, particularly to the fire which occurred on the "Gallileo" and to the facts stated by me in the hypothetical question, and I ask to tell me whether you can give us any information as to the contributing causes of that fire, taking into consideration the construction of the ship as I have described it to you in the hypothetical question, and I want you to base your opinion on those facts which I have given you in the hypothetical question.

A. Well, my answer would be consistent with what I have already said first: There was evidently heat generated. If there was heat generated, there must have been accessibility of oxygen to the coal. Now, as I understand the conditions on shipboard, there is nothing in those conditions which would prevent accessibility to oxygen, that is, oxygen getting to the coal, so that obviously the conclusion would be that that would be a contributing cause.

Q. I am directing your attention particularly to the "Gallileo" and to her construction as I have described it to you; can you tell us what features of the construction of the "Gallileo" you might have in mind in giving us your opinion that there would be accessibility of air to this coal?

A. As I understand the conditions under which the coal was stored, a retaining wall of wood was formed. If there was a retaining wall of wood, then there must have been

accessibility through that construction; I cannot conceive of a construction of wood in the ordinary sense of building bulkheads, which would not supply more or less oxygen, accessibility of oxygen through that construction, to the coal. Now, as to whether it would get enough oxygen or not, it seems to me would be answered by the fact that a [fol. 218] certain amount did get in, and that it certainly got enough to make a fire.

Q. I noted in a number of publications which I have read, an expression called "through ventilation". Do you understand what is meant by the expression "through ventilation"?

A. I think I do: The passage of air through a mass of coal—anything which would permit the passage or infiltration of air through a mass of coal, would be in a sense "through ventilation". That is to say, if there were a brace, in the construction, or if there were lumps of coal, or if there were segregation of sizes throughout the mass, as, for example, a zone of lump and no fine coal, and then another zone where was more fine coal than lump, those things would govern or affect the through ventilation; the more open the spaces, the more ventilation would be progressed freely through the mass, and the more those spaces were filled with fine coal, the voids would be cut down to the extent, and the through ventilation would be cut down. Now, if the through ventilation were sufficient in amount to equalize the heat generated, then the matter of rise in temperature would be controlled. If it is cut down—if the through ventilation is cut down any amount, then the heat generated will gain headway.

Q. Can you say whether or not if "run of mine" coal is placed in a compartment such as I have described to you, that is, a bulkhead built of wood which is not water-tight, and with a bulkhead built of wood at the other end, and with steel sides of the ship, and steel deck and with two ventilators in the aft part of the compartment, which, as I remember it, were about 23 or 25 feet aft of the wooden bulkhead at the forward end of the compartment, would [fol. 219] such a compartment as I have described be a proper and fitting place in which to store coal?

A. I think it would have dangers connected with it which would not make it a fitting place to store coal.

Q. What are the dangers connected with it, Prof. Parr?

A. Well, the chief danger is that it is exactly that condition which will supply enough oxygen to generate heat above that condition which would carry the heat away, and that is always a dangerous condition.

Q. That is the reason why you state it is an improper place in which to store coal?

A. It is.

Q. Are you in a position to state whether or not it is safe or dangerous to store freshly—new coal on top of old coal.

A. I should say that is a dangerous practice.

Q. Why do you say that?

A. Well, following the line of reasoning I have already given: It is practically impossible to store coal—a mass of coal against another mass, without regard to age, without the segregation of lump and fine stuff in such a way that there will be a channel formed for the passage of air. Now, that in itself has given a well established opinion that two piles of coal should not be brought together.

I have under my observation all the time, the storage of coal of this sort, and it is a positive injunction, that two masses of coal should not be allowed to come together, for the reason that segregation takes place in such a way that as the lumps roll down from each pile, they furnish a channel for the passage of oxygen, air. Now, there is a prejudice, a well established prejudice, against a new mass of coal coming in contact with an old mass. You can ascribe the same reason just as well, and say that it may not be due to [fol. 220] the fact that one is an old mass and the other new, but to the physical condition that you have encouraged, a segregation which allows for the passage of air. I think there are more deep seated reasons for keeping new coal away from old coal.

Q. What are those reasons, Prof. Parr?

A. I have already said that coal has a great avidity for oxygen, and it takes it on in a very large amount, and holds it somewhat tentatively, though chemically combined; and a new mass coming in contact with an old mass which is well saturated with oxygen, will supply that oxygen, will give it off, because of the avidity of the new coal for that particular element, and even though the supply may be rather limited to the new coal, here is a storage of a quantity in

the old coal which it is greedily seeking, and it constitutes a menace on that score, in my opinion, that is, the contact of old coal with the new.

Q. Now, there has been a suggestion in this case, although no facts have been brought forward here to substantiate it, that the old coal which I described to you in the hypothetical question, consisted of 160 tons, did not feel hot to touch for some time prior to the putting of the new coal on the old coal. Has that fact any significance in your mind?

A. Well, the fact that any coal mass is affected in its speed by the temperature, I think it has a very decided meaning, for example, in the transactions of the "Institute of Marine Engineers" for 1918, I am quite sure that is the date, Mr. Anderson suggests that the temperature of 90 degrees is a danger point.

Q. 90 degrees centigrade, or fahrenheit?

A. Fahrenheit degrees. Now, a mass of coal—and he says if it is 100 degrees it should receive immediate at- [fol. 221] tention. Now, 90 degrees to the hand on a hot summer day, would feel cool, and on a cold winter day it would feel warm, so that the matter of the 90 degrees is a relative factor, but it is a point which in these reports is stated to be dangerous.

Q. Is that your own opinion?

A. Yes; and I will say that Prof. Stoek—and I will say that Prof. Stoek's ideas are gleaned from a very wide lot of experience, he states the temperature—the danger temperature—might be higher than that; I think he states that a coal pile that goes up to 130 degrees, is dangerous. Now, the matter of what constitutes danger, is relative. Anderson says that 90 degrees is a dangerous point, and I agree with that, because it could not go up to 90 degrees without chemical action, and if it has chemical opportunity to go up to 90 degrees, it will go to 100 unless it is checked in some way.

Q. To put the matter shortly, then, Prof. Parr, may I ask you this question: Assuming that coal in the old pile—in other words, that the old pile of coal were so cool that you could put your hand on it in a summer day and you are not impressed with the fact that it is unduly hot, then you put in new coal on top of the old coal, can you say whether

or not that is a dangerous thing to do under the circumstances which I have just given you.

A. I should say it was a dangerous thing to do, for the two reasons as to the accessibility of oxygen, and the unknown factor of temperature, or indefinite factor of temperature, which you have not prescribed in your question.

Q. What do you refer to when you say "the indefinite factor of temperature"?

A. Well, supposing the old coal were 90 degrees. That would be dangerous, more dangerous than if the old coal [fol. 222] were 30 degrees, certainly; it constitutes a menace, greater in one case than in the other. Hence, it would be a very questionable thing to put fresh coal on top of old coal unless there were positive knowledge as to the temperature at which both the old and the new were being mixed.

Q. By that I take it you mean a knowledge much more positive than you could ascertain by putting your hand on the coal pile?

A. Positively.

By the Court:

Q. When you speak of old and new coal, do you mean newly mined coal, or coal that has been out of the mine for sufficient length of time to be called old?

A. I would call old coal, any coal that had been out and in contact with the air for—well, I should say six or eight weeks.

Q. And what would new coal be?

A. New coal would be as ordinarily—the time ordinarily consumed in transporting from the mine, which should not be more than 10 days.

Q. So really this is it, in other wo-ds, you are assuming, when you speak of new coal being put on old coal in the "Gallileo", you are assuming that the new coal was mined within 10 days?

A. 10 days or two weeks, yes.

The Court: There is no evidence of that, is there?

Mr. Jones: No.

Mr. Keating: None whatsoever.

Mr. Jones: There is no evidence as to when that first supply of coal was mined. But I will put a question:

[fol. 223] Q. The evidence which we have to consider and which I wish you to base your opinion on, Prof. Parr, and to exclude everything else, is this: That there was a quantity of 160 tons of coal that was in this compartment which I have described to you from June 30th up to the date of this fire. As I remember it, this fire occurred on August 28th. Then on or about August the 26th, an additional quantity of coal was placed in that same compartment on top of the coal which had been placed there on June 30th, the exact quantity of coal which was placed on top of the 160 tons is not given, but what the master says about it is as follows: "As No. 3 'tweendecks and shelter deck were full of bunker coal shipped in New York during the week on top of about 160 tons of coal left from previous voyage, I came to the conclusion that spontaneous combustion had set fire to the bunkers and bulkhead between No. 2 and 3 'tweendecks and the spar ceiling. We took No. 2 hatches off and found no smell of fire in No. 2 'tweendeck, which contained spelter and had 8000 boxes of lard in the after part. I decided to return to New York, and at 5:19 P. M. turned the ship around. I blocked off all ventilators to exclude air, concluding this the best thing to do until our arrival back in New York, when assistance could be obtained to shift coal to get at the site of fire which amount represented some 250 to 300 tons." Now I direct your attention to these specific facts, and they are all the facts which should be considered, and I ask you in answering the question which I am now going to put, to keep just those facts and those facts alone, in mind: Can you say whether or not it was a safe and prudent [fol. 224] thing to do, to place that coal which was put aboard during August, on top of the coal which was put aboard during June, having in mind that all of the coal was Morrisdale steam coal, and was "run of mine" coal?

A. I would say it was not a safe thing to do, not a prudent thing to do.

Q. Now tell us, keeping in mind those facts only, that I gave you, why?

A. The opportunity of segregation, in putting one mass of coal upon another, would constitute a menace, one menace.

The Court: May I interrupt? Of course, these things occur to me, and I am so ignorant of the science, that unless you straighten me out I may have misapprehensions.

By the Court:

Q. How would these segregations take place? Would it take place any more in adding several hundred tons of coal to a pile of several hundred tons, than by putting the whole quantity in on the one occasion?

A. If the added coal could be distributed on the coal that was already in the bunker, evenly, that would minimize the chance of segregation; but the fact is that when coal is piled, it rolls down the sides.

Q. It does that immediately, doesn't it?

A. It does that immediately.

Q. What difference does it make whether you put on the additional coal that same day or six weeks thereafter, if those lumps all rolled down to the sides?

A. Well, the new addition of coal has its own tendency to segregate along the line of contact with the coal that is already there.

Q. May I put it this way: Suppose you have 400 tons of [fol. 225] bunkers that you want to put into a compartment, and suppose the temperature remains just the same all the time, leave that element out, is there any more danger in putting in 400 tons the same day, or any less danger of putting all 400 tons in the same day, than in putting 200 tons in today and the next 200 tons in six weeks from now, leaving out the question, and leaving out of account, all limit of temperature?

A. Well, I would say that in putting all at one time, that whatever factors there were that would contribute to the oxidation, would be more and greater in amount than if it were divided over a period—a longer period—because whatever action there was which would generate heat, by that element of time, would have a chance to dissipate itself and not build up heat in the mass so greatly, as it would if it were all put in at once.

Q. The- you think it would be safer to put in 200 now and 200 tons six weeks from now, than to put it all in today?

A. Well, I would modify that a little: 200 tons at once might not be the same or have the same effect that 200 tons would added gradually all the time over the length of time, which would allow any heat which might be generated to escape, while the process was going on. That would be less dangerous than to put in a large mass *in* at

once in a heap, where, whatever heat was generated would be held by the non-conductivity of the coal.

Q. There is just one further question I want to ask: This matter of the segregation of lumps and fine stuff, that is not, or is it, done to a greater extent in putting in half of the whole mass today and another half six weeks from now, than in putting the whole mass in today, on just that matter of segregation alone?

[fol. 226] A. I think the total amount of segregation would be somewhat in proportion to the mass that was applied. If 400 tons were put in, there would be correspondingly more avenues of segregation than if it were 200 tons. Yes, I think the matter of segregation is somewhat in proportion to bulk.

Q. I have not made myself plain: You see, the situation here is, according to the hypothetical question, that there was a certain mass of coal in there. Now you say it had become segregated to some extent, the lumps on the side and the fine stuff in the center; and that after it had been in that condition for a while, some more coal, not necessarily newly mined——

A. A new supply?

Q. Another supply of coal was put in; and you say that the segregation as to the new supply would be the same as to the old mass; in other words, the lumps would go to the sides and that that was a contributing cause in this fire. Now, what I want to know from you is: Considering only that matter of segregation, would it be any more dangerous to have put your coal in in those two instalments than to have put it all in in one instalment on one day, just considering the segregation.

A. I don't think that it would add to the danger to put it in, in two instalments.

Q. I see. So that the only thing that adds to the danger, as I understand it, of the two instalments, is this matter of the temperature of the original instalment?

A. That is a very important matter.

Q. That is the only thing, isn't it? I am trying to clear up points in my own mind, you see. Is that the only thing?

A. If you grant that the accessibility or the availability of oxygen is the same throughout, I would think that this [fol. 227] matter of temperature then would be the chief thing involved.

The Court: All right; go ahead, and excuse the interruption.

Mr. Jones: I was going over to some questions along that same line.

By Mr. Jones:

Q. Can you tell anything as to the temperature of the interior of a pile of coal, by feeling the outside of the coal?

A. No.

Q. Can you say whether or not the temperature of the interior of a pile is as important as the temperature on the outside of the pile?

A. I think it is more important.

Q. Can you tell anything about the temperature of the interior of the pile by feeling the outside of the pile and walking around to smell gases?

A. I don't think you can excepting perhaps in this particular, if you can smell gases, you know the temperature is high enough to produce those gases. If you do not smell any gases, the temperature is not that high. But that is a rather far-fetched condition, and I don't think that the ordinary properties of sense would tell you anything about the temperature of the interior of the mass.

Q. Prof. Parr, are you familiar with whether or not it is generally known among persons who are dealing in coal, that it is considered an improper thing to place a fresh supply of coal on top of an old supply of coal?

A. That is common—I would say that is the common idea; I think it is well established that that would be accepted as a fact.

[fol. 228] Q. Now, then, I wish to direct your attention to the further fact: It is stated in the interrogatories as follows—and I will read you a number of questions and answers. This is interrogatory No. 3, sub-section F:

"How was your lot of coal stowed with relation to the other lot of coal in No. 3 'tweendecks?

"A. The relation of the storage of these two lots of coal was that the first lot of coal was scattered about in No. 3 'tweendecks, and the second lot of coal was stowed on top and alongside of the first lot.

"Q. How old were each such lot of coal?

"A. The first lot of coal had been on board since about June 30th, 1926; the second lot of coal had been on board since on or about August 26th, 1926.

"Q. In what enclosures, containers, or holds, had it been confined after its receipt on board the 'Gallileo', and for what period of time?

"A. The first lot of coal had been in No. 3 'tweendeck since about June 30th, 1926, the second lot since about August 26th, 1926."

Now, keeping in mind the facts which I have given you in the answers to the interrogatories which I have just read, can you tell me whether or not it was safe to place this lot of coal which was received on August 26th, 1926, on top of the lot of coal which was received on June 30th, 1926, and which was, as stated in the answer to the question F, "was scattered about in No. 3 'tweendecks"?

A. I think it would be considered bad practice to add [fol. 229] the new lot to the old lot under these conditions.

Q. Would you consider it unsafe is my question.

A. I would.

Q. Now I direct your attention specifically to the following interrogatory:

"What was the condition of the timber wooden bulkhead in No. 3 'tweendecks as to being watertight?

"A. The timber wooden bulkhead was in good condition, but was not supposed to be watertight."

That is the bulkhead, I now tell you, at the forward end of this compartment. Can you say whether or not the condition of the bulkhead as described in the answer which I have just read to you, was a contributing cause to the fire?

A. I think it would be so considered.

Q. What do you consider? I don't know what others would consider.

A. I would consider that factor a contributing cause: A bulkhead which would admit acquisition of air would be a contributing cause to the difficulty.

Q. Why do you say so?

A. From my knowledge of the behavior of coal and its appetite, so to speak, for oxygen; it would get oxygen through the medium of that sort to supply itself, I mean.

Q. Giving oxygen, how, to the coal?

A. By passing through the bulkhead.

Q. And would that be oxygen supplied to the surface of the coal, or to the body of coal, or how?

A. It would not make any difference to the coal where it came from, so it got it; but it would seem to me that it could get sufficient to constitute a menace, through the bulkhead.

Q. Now I call your attention also to the fact that there [fol. 230] was a wooden bulkhead in the after part of this compartment. Can you say whether or not the presence of a wooden bulkhead in the after part of the compartment, was a contributing cause to the fire?

A. I think it would be a dangerous condition, whether a contributing cause to that particular fire or not would depend upon whether the other conditions were of a type to speed up the reaction to the point of ignition.

Q. Assuming further there were two ventilators in this compartment, located about 23 or 24 feet abaft of the wooden bulkhead at the forward part of the compartment, that is, you have the two wooden bulkheads which I have described, one in the forward part of the compartment which is described as being a "temporary wooden bulkhead in good condition, but not supposed to be water-tight," and then a wooden bulkhead con*con*structed of pieces of wood which were horizontal, in the after part of the compartment, can you say whether or not, in your opinion, such a compartment was a safe and fit place in which to store coal, and assuming further that there was burlap over the aft wooden bulkhead.

A. I would not think that it was a safe place to store coal.

Q. Can you say whether or not the condition of the compartment which I have described to you, was a contributing cause to the fire which I have mentioned to you in my hypothetical question?

A. I think that it should be so considered.

Q. Is that your opinion?

A. That is my opinion.

Q. Now, then, as I take it from what you have said, there are three contributing causes to the fire.

Mr. Keating: I object to any leading or suggestions.

[fol. 231] Mr. Jones: Very well; I was just going to sum up what the professor said. What he said is quite clear.

The Court: I would prefer to have him do it, and I will ask you to go ahead, and give an exception to you, Mr. Keating.

Mr. Keating: Yes, but let the professor sum it up, and not Mr. Jones—that is what I object to.

The Court: I want to make sure that I have the professor's idea on several of these questions.

Mr. Keating: I would like to have them too, but I don't want Mr. Jones' view.

The Court: All right, then, but I want the professor to sum up.

Mr. Keating: I agree on that.

Q. Now, professor, what I want you to do, I was going to state that question to save us all a little time, but in order to conform with my friend's wishes——

Mr. Keating: Not to lead the witness.

Q. —I will ask you to state what are the contributing causes to the fire which occurred on the "Gallileo", keeping in mind the various factors which I have called to your attention.

The Court: Just enumerate them without describing them.

Q. (Continuing:) The physical conditions which I have called to your attention.

A. I would say, first, the retention of the coal mass by a wooden bulkhead. I would say, second, the physical con- [fol. 232] dition of one mass of coal against another, and of run of mine coal, which would give accessibility of oxygen to the coal. I believe the matter of fineness of division is a contributing factor. I believe that the fact of the old supply in contact with the new supply, would also be a contributing factor. I believe also the possibility of a temperature—of a starting temperature—is a contributing factor. An initial temperature, in the storage mass or masses, might be a contributing factor. I think that summarizes the various conditions.

Mr. Jones: You may cross examine.

Cross-examination.

By Mr. Keating:

Q. Mr. Parr, have you had any personal experience with ships?

A. I have had a limited experience with ships.

Q. Do you know anything about ship construction?

A. Not as an engineer, no.

Q. You have never been a ship surveyor?

A. I hardly know what you mean. I have surveyed cargoes of fuel for the purpose of finding out facts, mainly about the fuel, but not about the ships.

Q. Have you ever personally investigated any bunker fires on board ship?

A. I have not.

Q. Have you ever been in a coal bunker?

A. I have.

Q. Have you ever been on board a steamer where they carried coal similar to the place that Mr. Jones has described to you in his hypothetical question?

A. I have.

Q. When was that?

A. About the year 1912.

Q. Much of the same kind of a place, was it?

A. It was specifically a bunker ship for the transporting [fol. 233] of coal, whether it was mechanically constructed in this same way, I doubt, because it was a coal ship, and not a general cargo ship.

Q. Have you been aboard any other ship besides this coal carrier?

A. I have been a passenger occasionally on shipboard.

Q. Did that take you down into the engine or bunker section?

A. Naturally I gravitated toward the fuel part of the ship.

Q. What ship was that?

A. I cannot quite recall the name of the ship I was a passenger on in 1900.

Q. It is a long time ago.

A. It was a German Lloyd Line ship.

Q. In giving your opinion on the causes of this fire, you

start off with the fact that there was a fire; am I right about that?

A. Yes, sir.

Q. And therefore you know and have told us that oxygen is necessary, that there must have been enough oxygen coming from somewhere to have caused that fire?

A. Yes, sir.

Q. Now, you have told us, as I recall your statement, there were two principal factors—the availability of the supply of oxygen, and the temperature of the mass. Did I understand you right on that?

A. Those are two of the factors, yes.

Q. Two principal factors?

A. Two principal factors.

Q. Now, have you ever examined spaces on shipboard to determine whether they were fit to carry coal?

A. I have not.

Q. Does the fact that they had a fire in this space, No. 3 'tweendecks, described to you by Mr. Jones, have any influence on your opinion that it was an improper place to carry it?

A. Naturally so, I would say so.

[fol. 234] Q. Isn't that the real reason why you criticize it?

A. It has its reasons, certainly.

Q. I mean to say, that you know, and we all know, there was a fire in that 'tweendecks.

A. Yes, sir.

Q. What you are saying to us in substance is, isn't it, that that proves that that was a bad place to carry coal?

A. Certainly that is a conclusion that I would arrive at.

Q. You have not started at the other end of this investigation and figured out in your own mind what would be an ideal place on board a ship to carry coal, have you?

A. Yes, sir.

Q. What would be the ideal place?

A. I have been engaged for 20 years in storage of coal, and the storage of coal is just the same on land as it is on sea; and I think I know the conditions that must be followed for safe storage of coal. First and foremost, either absolute exclusion—excuse the word "absolute", I will leave that out—either exclusion of the oxygen, or free circulation enough to carry off the heat. Now that does

not make any difference whether it is on shipboard or on land. That is a condition sometimes very difficult to get, those conditions enter into it. Within the last three years there have been stored about 15,000,000 tons of coal, without loss. That does not look as though is was difficult.

Q. Was that the coal that was submerged?

A. It was not, none of it.

Q. There have been extensive experiments carried on in the last few years, have there, on this subject of storage of coal safely?

A. A few years? If you mean by that 20 years, I would say yes.

Q. And knowledge has gradually been accumulating, the way knowledge does?

A. Certainly.

[fol. 235] Q. Now suppose, Prof. Parr, that an investigation had been made of the so-called old coal, that is, the coal that was in this ship since June 30th, suppose they drove a pipe down, for instance, in the body of the coal and took the temperature with a thermometer, suppose then, that whatever they did, there was an adequate and full investigation made, and that that coal was not warm, that it was below the temperature that you have mentioned, considerably below, would you say that it was unsafe to load a new lot, not freshly mined coal, but a new lot of the same grade of coal, on top of the old coal?

A. In proportion as that temperature was low—lower than the danger point, in that proportion it would be safe, but not necessarily—it would be safe, but not necessarily safe.

Q. Well, now, suppose this ship, the "Gallileo", arrived in New York with that 160 tons of coal in No. 3 'tween-decks, which was then a little less than two months old, because she arrived here, I think, on the 22nd or the 23rd of August, perhaps, somewhere in that week anyhow, she was loaded up on the 30th, do you think that the coal ought to have been thrown away?

A. I do not.

Q. What should the shipowner do?

A. He should not pile in a new lot on the old pile.

Q. Where should he put it?

A. I think the general concensus of the advisors for handling fuel on shipboard would say it should be put nearer the outlet, so that it would be used out first.

Q. The idea would be to use that coal up more—before any of the later coal was used; is that the idea?

A. It would be a procedure of safety to put it where it [fol. 236] could be gotten out earlier rather than late.

Q. In other words, the oldest coal on board a ship ought to be used up first; is that correct?

A. It is.

Q. Are you familiar with the practice of bunkering ships?

A. I am.

Q. Do you know whether or not it is a common practice in the steamship business, to load new lots of coal on old lots of coal?

Mr. Jones: If your Honor please, I object to that question, on the ground that here we have evidence of a dangerous condition, and nothing as to practice is admissible under the circumstances.

The Court: It is certainly proper on cross examination. We haven't got it established as a fact, that it is dangerous, or, rather, found it is a fact; and this witness says it is dangerous, and I think it is proper cross examination.

Mr. Jones: I would like to call your Honor's attention to the case of Cudahy Packing Co. against Nargisenfeld in 3 Fed. Second 567, which is the opinion of our own Circuit Court of Appeals, in which the Court said:

"It is well settled law that usage will not be allowed to subvert an established rule of law. To allow this to be done, as was said in Barnard vs. Kellogg, would lead to mischievous consequences, embarrass trade, and be against public policy. An established rule of law cannot be changed by any local custom of the place where the contract is made."

[fol. 237] The Court: What has that got to do with what we are considering?

Mr. Jones: And then I call your Honor's attention to what is also said in that case:

"It is said that the trial court erred in excluding evidence offered in behalf of defendant showing a custom in the

wholesale egg trade in New York City for the buyer before purchasing, to inspect only ten cases out of a carload, to consider the seller as representing that the balance of the eggs are equal in quality to those inspected, and if, when examined within a reasonable time after delivery, all the eggs do not conform in quality to the ten cases inspected, for the buyer to make an allowance for defective eggs, or take back the shipment."

The Court: I do not see the relevancy of that, Mr. Jones; I wish you would if you can point it out to me.

Mr. Jones: Also the case of Tilley against County of Cook, 103 U. S., in which the Court said:

"It is complained that the evidence offered to prove the custom of architects, was excluded. We think it was rightly excluded. Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement or to explain the terms of a written contract. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with, the contract."

The balance of my objections are, I object to any evidence [fol. 238] of usage or custom on the following grounds:

1. On the ground that the usage or custom has not been pleaded; and

2. On the ground that usage will not be allowed to subvert an established rule of law that cargoes shall not be stowed in an unsafe and dangerous compartment; and

3. On the ground that evidence of custom or usage will not be permitted to vary the terms of the written contract of carriage requiring due diligence to make the vessel safe and fit for the carriage of cargo; and

4. Upon the ground that the respondent is precluded from setting up any defense of usage, because by stowing the goods in an unsafe compartment, the vessel broke her contract, exposed them to greater risk than had been agreed, and thereby directly caused the loss and accord-

ingly became liable for a deviation and cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit and must account for the value at destination.

See the St. Johns Company General, 263 U. S. 119.

I have stated my objections.

The Court: I overrule the objections, and admit it, with an exception to the libelant, and I take it on two grounds:

In the first place, it is proper cross examination;

That in the second place, as being relevant upon the ques-
[fol. 239] tion of what is due diligence.

The respondent is held only to the degree of care which an ordinary person would have exercised under the circumstances, and I hold that it is open to him to prove, if he can, at the time that there was a general custom in regard to this situation.

Mr. Jones: The care an ordinary person should have exercised, if your Honor please.

The Court: Would have exercised under the circumstances, as carrier of goods; an ordinary person would have taken a certain degree of care; as high a degree of care as an ordinary person would have taken. If he can prove that generally, in the trade, it is done in a certain way, that is evidence on the question of whether what was done here was up to the standard of an ordinary person in this line of business.

I will overrule the objection, with an exception to you.

Q. Will you repeat the question to the witness.

(Question repeated by the reporter as follows:

"Do you know whether or not it is a common practice in the steamship business, to load new lots of coal on old lots of coal?")

A. I do not know what the practice is or what the custom is.

Q. Professor, what have you to say about the time element involved in the situation? Is the time element a factor
[fol. 240] —the time element involved in ignition—is there any relation between the time that that coal starts to heat, and the ignition point, with respect to the supply of oxygen and the original temperature of the mass?

A. That would be one of the factors, but not the only one, governing, the matter of time.

Q. Will you please tell us what the factors are in relation to the time element? In other words, you have stated, Professor, that certain things were dangerous according to your view. I would like to have that tied up in some way to time. In other words, do you expect a fire in five minutes, or ten minutes, or two days? I am not trying to suggest any time to you, but I would like to get your views on the relation of time to the amount of oxygen supplied.

A. I was supervising storage of several thousand tons of coal in which case some of the car lots could not be cared for, and we shunted it onto a side switch, and unloaded by hand. The same coal was put in another mass. The one coal was ablaze in four days, and the other coal from the same mine, same shipment, was in storage for seven months. Now, it is a little difficult to apply a rule which covers the time. The chief factor in the case, I presume, was the accessibility of oxygen in the one pile and the non-accessibility in the other. Now, as to how much oxygen would be required to set fire to one mass quickly, and not at all to another, would be simply a matter of how much would be required to do that amount of heat—to make that amount of heat.

Q. If there is a small amount of oxygen, is the process slower than if there is a large amount?

A. It is.

[fol. 241] Q. And another factor in the situation would be the original, what you call the mass heat, or the heat of the mass, rather?

A. That would govern in a large measure the speed of the reaction.

Q. Now, Prof. Parr, if that coal in those coal bunkers, the old coal, was so hot that it was burning the men's shoes who were trimming it in certain places, I don't mean the whole mass was hot, but that certain spots in this pile of old coal was so hot that it was burning the men's shoes, would there be any question at all in your mind that the coal ought to be taken out of there?

A. It ought to be done at once, or at least something done with it to cool it down below the ignition point.

Q. If it is that hot, it is probably on fire in some place, isn't it?

A. Depending upon what you mean by being on fire; if it is that hot.

Q. What we call a hot spot?

A. A hot spot, it certainly is a dangerous factor, and ought not to be passed by without some attention given to it.

Q. And you would suggest what?

A. I would suggest taking it out and putting it where it could be immediately used under the boilers; that is our practice, wherever a hot spot occurs, it is taken out and put where it can be immediately put to the boilers in the process of the boiler supply; and by the term "immediately", I mean put in process of being fed to the fire. If, in that process, the temperature of the mass, by turning it over, is cooled down below the ignition point, it will stop burning.

Q. Now, Professor, how soon might there be spontaneous combustion? What is the shortest time that you have experienced?

[fol. 242] A. I have a lot of experiments which show that from a certain temperature of a coal mass, let us say 300 degrees, which might be a scorching temperature for the shoes, it is about 30 minutes until it is afire and glowing, if it has a supply of oxygen.

Q. Now suppose, Professor, that you assume an ordinary mass of coal that had been mined a month, leave out this question of freshly mined coal, I want you to eliminate that from your mind; if you take some Morrisdale coal which was properly seasoned, or whatever the technical name is, and put it in this compartment that Mr. Jones and you and I have been talking about, how soon would you expect a fire to occur? I am only thinking now about the original coal that you were putting in there.

A. The factors that enter into it are so numerous that unless they are designated it would be impossible to say. It would take a long enough time for the fire to break out, is the only answer that can be given to your question.

Q. Dr. Porter offered us an answer from one day to 30 days. Do you agree with that statement of his, or do you disagree?

A. I heard his statement.

Q. Do you agree with it?

A. I would say that my answer to it would be entirely different; I would say it would depend upon the conditions. If the conditions were right, one day would be enough. If they were not right, and were such conditions they might re-

quire 30 days, and then it would take 30 days. So I agree with Dr. Porter.

Q. I am trying, Professor—perhaps I have not made myself clear; but I am trying to get you into this compartment [fol. 243] that Mr. Jones has described to you in his hypothetical question, and his supplemental questions, and ask you to keep that compartment in mind.

The Court: On the "Gallileo".
Mr. Keating: On the "Gallileo".

Q. And I ask you to assume that, say 350 tons of coal were put in there on June 30th, 1926, under all the conditions that Mr. Jones has assumed; and I ask you to tell me how long in your opinion after, would that coal have been on fire.

Mr. Jones: Assuming that there was of the old coal, 160 tons, and thereafter this was put on top of it?
Mr. Keating: No, no, no; I am asking only that the original space in the "Gallileo" is as described by Mr. Jones, which was described here very fully, and all the assumptions that he made, and there is only one lot of coal put in, in No. 3 'tweendecks on the "Gallileo" on August 30th.

Q. I would ask you to tell me how long before, in your opinion, there would have been a fire, if there would have been a fire, in your opinion, under those conditions. Is it your opinion that there would have been a fire shortly?

A. I think that the conditions are such as to make it quite probable that there would have been a fire, almost a certainty that there would be a fire.

Q. And how long, in your estimation, would that process take? Leave out—I have not the date when some fire occurred; but just disassociate from your mind the fact that you knew there was a fire, and you were only looking at [fol. 244] this space that this coal occupied, and you knew all the facts that Mr. Jones had told you about it, and you were asked to described to us and tell us as closely as you can when there would have been a fire.

A. I don't think that it is possible to say how long it would take before a fire would break out, because the conditions are not known. I can give you my experience from similar conditions where a fire——

Q. But, my dear Professor, Mr. Jones has told you all the conditions.

Mr. Jones: Let him answer the question, please.

The Court: No, he was not answering it, though.

A. Well, may I not answer that question by inference from similar conditions.

The Court: Give us your opinion, is the question.

A. (Continuing:) My opinion would be that it might break out in 24 hours; it might take a longer time than that; there is no reason inherent in the case itself why it might not be hot enough to reach a danger point at least in 24 hours.

Q. That is, after June 30th?

A. I thought you were talking about August; you said something about August.

Q. No, I am afraid I have not made myself clear, and I am sorry, Professor: I am asking you to assume that on the steamer "Gallileo", all the phyical conditions regarding bulkheads, and so forth, that Mr. Jones has asked you to take into consideration in his hypothetical question, [fol. 245] existed on June 30th, 1926, and that on that day 350 tons of Morrisdale coal was put into the space on June 30th, and remained there, going back and forth across the ocean; and I want to know when, under those conditions, you would have expected a fire in that mass, that is, only the mass that was loaded on June 30th, 1926.

A. I would say it would not be a safe condition, and I would——

Q. I have not asked you that, Professor; I asked you how long it would take before it took fire.

A. I do not think it would be possible to say how long, because you do not specify—you will not allow me to specify the conditions excepting as they are——

By the Court:

Q. What are the conditions that you have in mind?

A. The condition of accessibility of oxygen is one.

Q. But don't you see, that is specified in the question, the actual physical conditions are specified: With bulkheads such as have been described here, and with a hold such as

was described, and ventilators and so forth, under those conditions, what is your answer, for there is a certain accessibility of air; now, with that accessibility of air, how long will it take?

A. It might not reach the combustion point at all.

By Mr. Keating:

Q. The fact that no fire took place—of course, this has not been proved, but I ask you to assume, Professor, that there was no fire took place until August the 28th, that is, [fol. 246] for a period of approximately two months, does that indicate in your mind at all, anything with respect to the supply of oxygen that was in that physical place, under the physical conditions described by Mr. Jones?

A. Not alone, not necessarily no.

Q. Does not indicate anything about oxygen supply, the fact that no fire took place for approximately two months?

A. It would indicate that the conditions of the oxygen supply, among other conditions, was not sufficient to be a contributing cause.

Q. Now if on June 30th this coal was in a dangerous state, say, of 90 degrees, and there had been considerable oxygen supplied to that coal on June 30th, and a few days following, you would have expected a fire very quickly, wouldn't you?

A. I would have expected a fire.

Q. Quickly?

A. Yes, quickly.

Q. Does the fact that no fire did occur until August the 28th, is some indication, isn't it, that the original temperature in that coal and the amount of oxygen—that the original temperature of that coal was low, and the amount of oxygen supplied during the following two months was very small?

A. It would not cause the combination to be in the direction that you state, yes.

Q. That is what that indicates, doesn't it?

A. Yes.

Q. Is there any question about that?

A. No.

Q. In other words, if you are going to have a quick fire in a mass of coal, you either have got to have—you have got

to have two things: You've got to have a fairly high temperature in the coal, and a fairly large amount of oxygen?

A. Accessibility of oxygen, I should say.

[fol. 247] Q. Yes, accessibility.

A. That involves fineness of division, which is a factor of accessibility, and segregation of the mass, which is a factor of accessibility—under those conditions I would say yes.

Q. These conditions that you talk about, the fineness of the coal and all that sort of thing, and the piling of the coal, that affects your opinion with respect to the availability of oxygen?

A. It does.

Q. And those are the only importance of those considerations in the fact that they determine, so to speak, the amount of oxygen available?

A. The accessibility of oxygen.

Q. So that if you get to the point where you have not any fire for a considerable period, you are entitled to assume, are you not, that there was nothing radically wrong with the temperature of the coal, and that the availability of oxygen supply was not too great?

A. Yes; I would add also that an opportunity for discharging the heat or dissipating the heat was sufficient to keep the temperature down.

Q. That is, for that period of time, that would indicate that there was nothing seriously wrong with the storage space?

A. Yes.

Q. Now, when you get down to the fact that the fire occurs within a very short time after coal is loaded, then you know that there has been something serious happened which has caused a large supply of oxygen or the raising of the heat of the mass; is that correct?

A. A confining the heat of the mass and preventing its dissipation, yes.

Q. Now if, on August the 26th, the temperature of the mass was quite high, excessively high, and new coal was [fol. 248] dumped onto that pile of coal, the temperature of which was quite high, would you expect a fire very shortly—would you not?

A. I think so; yes.

Q. Might it happen in 8 or 10 hours?
A. I don't know.
Q. Would you not say it would?
A. Certainly not.
Q. Would it happen in 24 hours? Would you expect it within a fairly brief period—and by brief period, I mean 24 or 48 hours.
A. I would expect it within a brief period.

Redirect examination.

By Mr. Jones:

Q. Mr. Keating has asked you a number of questions about the heat in this first lot of 160 tons of coal which was put in the ship on June 30th. Assuming that there was only a small patch of that coal that was hot, would that be sufficient to generate a fire?
A. It would.
Q. In other words, you do not require that the whole mass be heated?
A. Absolutely not.
Q. I do not know if it is necessary to ask you this question, but in order that there may be no misunderstanding, I will put it to you: In the light of all of the facts that have been put to you by Mr. Keating, is it still your opinion that this compartment was an unsafe compartment in which to stow coal?

Mr. Keating: I object to the question as grossly leading.
The Court: I will allow it. Exception.

A. I would say yes.

[fol. 249] Thomas Lawrence Stanley, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Mr. Stanley, what is your business? A. Consulting engineer, marine surveyor.

Q. How long have you been a consulting engineer and marine surveyor?

A. I have been consulting engineer for myself for close to three years now.

Q. Will you give the Court a brief account of your experience and training.

A. After leaving school I spent about 6 years apprenticeship in the building of marine engines and boilers and installation of them in ships; after which I went to sea for close to 6 years; following which I was in Robbins Dry Dock for about a year; after which I was then surveyor for the Naval Construction Department in Quebec for a year; after that I was for about 4½ years superintending engineer for the Submarine Board Corporation in the Port of Newark on the building of ships; after which I was for between 4 and 5 years superintending engineer for the Transmarine Line in charge of their ships, and of the engineering operations of the vessels; that would bring me down to the time I started in business for myself.

Q. Have you made a study of coal fuel and the possibilities of spontaneous combustion in coal fuels?

A. Well, I have kept myself up with the times, to cover any job when I was at sea, naturally.

Q. Did you make a trip to sea, did you go to sea, on [fol. 250] coal-burning ships?

A. All the ships I was at sea on were coal burners.

Q. Did you have practical experience with fire in bunkers?

A. Yes, I have had fire on two occasions in the bunkers; one very small fire in one of the holds of the ship, at one time.

Q. Did you hear the hypothetical question I put to Dr. Porter?

A. Yes.

Q. Are you in a position to express an opinion as to the contributing causes to the fire which I described in that question?

A. Yes.

Q. Will you give us your opinion as to the contributing causes of the fire which I have described in that question?

A. It is my opinion that the cause for that was the non air-tight bulkhead—the wooden bulkhead here described, which allowed the air to filter through the body of the coal,

thereby allowing it to generate heat from an absorption of oxygen; and in addition to that, the other coal was put on top of the old coal instead of first removing the old coal to a place by itself where it would be used as quickly as possible, in addition to these, it is my opinion that any coal which has been in a bunker or an enclosed space for any—for a long period of time, and thereby allowed to absorb oxygen, that the reason it might not have gone on fire is due to the fact that there may have been ideal conditions for through ventilation offsetting the heating of that coal, and the putting on of another layer of coal on top of that, which of course is a very poor conductor, might have the effect of shutting off that through ventilation and thereby allowing the coal underneath to heat up and catch fire.

Q. Mr. Stanley, can you say whether or not this matter of the avoiding through ventilation, is a subject that is well [fol. 251] known to people in the shipping business?

A. Yes, it is; it is in every engineering book, for instance, that I ever read, the question is taken up of the danger of coal absorbing oxygen and generating heat, causing fire.

Q. Do you know of any other publications containing references to it?

A. Well, it is always in Lloyd's Register, and then there are always various pamphlets, from time to time, some engineering societies, and papers being read, and pamphlets—my own experience has been from Lloyd's——

Q. You refer to Lloyd's Register?

A. Lloyd's Register of Shipping.

Q. Do you know anything about a book called Lloyd's Calendar?

A. Yes, there is something in that on spontaneous combustion in every issue; and it is issued every year.

Q. Can you say whether or not a compartment such as I have described in the hypothetical question, is a safe place in which to carry bunker coal?

A. In my opinion it is not.

Q. Why would you say it is not a safe place?

A. Because in order to provide a safe place for the carrying of coal, there are two essential points that have to be accepted. One is to exclude all the air, if possible; and the other is to create a condition where you would have a constant circulation of air through the body of the

coal, which would be sufficient to offset by cooling, any heating that might be generated by the absorption of oxygen from the air.

Q. Do you know anything about what they call "surface ventilation"?

A. By the surface ventilation, is meant just the ventilation provided by ventilators, or an opening of the hatch, [fol. 252] or whatever the way providing for getting onto the top of the mass of coal, which is for the purpose of eliminating the dangerous marsh gas that may come out of the coal and which is of course lighter than air and comes up on the under side of the deck, and which, if mixed in the proper proportion of air, will cause an explosion if there is a naked light produced in there.

Q. Assuming that the ventilators in the compartment which I have described to you, consisted of two ventilators in the aft part of the compartment, the two ventilators being located about 23 or 24 feet abaft of the wooden bulkhead which I have described, would you say that would be proper ventilation for that compartment?

A. It would be proper ventilation for taking care of the marsh gas, but it would not be proper ventilation in my opinion for cooling the coal down, for preventing a spontaneous combustion.

Q. What would be, in your opinion, a proper ventilation?

A. Well, my own method of handling that thing has been to exclude all the ventilators as far as possible, that is, any ventilators into the bunkers except just in so far as opening the hatch was concerned while the men went down there, to give them an opportunity to go in and do some work.

Q. What have you to say in respect as to whether or not the bulkhead would be air-tight?

A. Absolutely should be air-tight, without any question whatever.

Q. You can say whether or not a non-watertight bulkhead is air-tight?

A. No, it could not be air-tight.

Q. It would not be air-tight?

A. No.

[fol. 253] Cross-examination.

By Mr. Keating:

Q. Mr. Stanley, you hold a chief engineer's license?

A. I have a British chief's and an American chief's for steam, one for Diesel and for electric drive.

Q. When did you get your license?

A. Which, the English ticket?

Q. Yes.

A. Just about the outbreak of war, just before that, around that time, 1914.

Q. Did you go to sea as a chief engineer?

A. Yes.

Q. For how many years?

A. For, roughly, a year as chief.

Q. Before that time you were what?

A. Third and second.

Q. Third and second?

A. Yes.

Q. Has the chief engineer any duties in respect to coal?

A. He has the job of superintending the consumption of it.

Q. Anything else?

A. It is his duty to report to the office how much coal he has left aboard, and show what he did with the other and how he consumed it, and so forth.

Q. Any other duty?

A. Well, it is his duty once the vessel leaves the dock, to take full charge of his entire department.

Q. I am talking in regard to his duties in respect to coal.

A. Just what do you mean, "in respect to coal"?

Q. Have you enumerated all the duties that the chief engineer of a vessel has in respect to the receipt and stowage and care of coal on board a ship?

A. And the use of it.

Q. And the use of it?

A. Yes.

Q. Does he have any duty about its receipt?

A. The chief engineer's job as a rule is to see it stowed. [fol. 254] In other words, watch that the trimmers do not leave pockets in the middle of the coal.

Q. Has he any duty of inspection of the coal?

A. Well, my knowledge in British ships is that he has not a thing to do with it; in fact, nothing to do anyway, either with the quality or the price or anything else, and in very few cases anything to do with it at all.

Q. Did you have anything to do when you were chief engineer, with the inspection of your coal?

A. No; none whatever.

Q. You took just what came aboard?

A. I took what was ordered.

Q. You didn't look at it and see the coal?

A. Well, I looked; but as to complaints—do you mean other chiefs that I was with, or only when I was the chief in charge?

Q. I mean in respect to your own work.

Mr. Jones: Let him answer the question, please.

A. In my own case I never knew of any complaint I made had a particle of effect.

Q. Your owners were a bad lot; is that right?

A. I take it that the superintendent engineer figured that he knew best what should be aboard.

Q. You think he knew more than you?

A. In his opinion apparently he did.

Q. I am asking for your opinion?

A. In my opinion I don't think he did.

Q. Well, that is a legitimate issue! Now, did you have in your whole like as a chief engineer, did you ever load any coal that was sent aboard your boat, on top of any coal that was already there in your bunkers?

A. No.

[fol. 255] Q. You never did?

A. No, sir—yes, I am wrong there: I have loaded coal and thrown it on top of the coal that was in the side pockets, because, naturally, we were never absolutely out of coal, and it was put down into the side pockets on top of that.

Q. But in all your other experience, you never loaded any coal into your bunkers without first cleaning them out; is that correct?

A. Oh, no, no, I didn't mean that at all; without moving the other coal out of the way and not putting new coal on top of old except in cases where it was put down, the first lot of coal coming down into the side pockets.

By the Court:

Q. What are the side pockets?

A. The side pockets are the first tap of the coal to the stoke hole. You have your side pockets that have a sliding hole leading onto the floor plates of the stoke floor, and that is the first one that is used. In other words, this will flow into them from the first that is put into the pockets, and comes down into that hole.

By Mr. Keating:

Q. What is the size of the side pockets?

A. That all depends upon the size of the ship.

Q. Well, your ships.

A. I could not tell you that offhand now.

Q. I will suggest to you, they would hold about 10 or 13 tons?

A. I would say that was entirely ridiculous.

Q. All right; I am asking you?

A. Absurdly small, your Honor.

[fol. 256] The Court: Too small?

The Witness: Oh, yes.

Q. Well, let us create the absurdity into a fact; tell me how much they would hold?

A. I would say that the side bunkers would hold——

Q. Side pockets.

A. Side pockets.

Q. Not side bunkers.

A. I don't know that anybody knows that there is any difference in it, when it comes to that.

Q. Well, please do not fence with me; tell me how much the side pockets hold.

A. I don't like these interruptions.

The Court: Just think of the question, please, and answer it. Read it to him.

Q. (Repeated by the reporter.)

A. Roughly speaking, 50 tons a side, I would say.

Q. Now, what was the name of the ship on which you served as chief engineer?

A. "J. Y. Short."

Q. Do you say that it is a general practice in—are you familiar with the general practice of loading bunkers in New York?

A. Yes.

Mr. Jones: May I have the same formal objection that I made before on the question of such proof of custom, if your Honor please, with the same force and effect as if I repeated the whole objection?

The Court: Yes, and I will overrule the objection and give you an exception.

Q. What is the practice with respect to fueling, that is, filling in with new coal over the old coal left from a previous voyage?

A. Trim it into a position to use it as quickly as possible.

[fol. 257] Q. You approve of that practice?

A. I certainly do.

Q. You would not favor throwing away the coal?

A. Oh, no.

Q. Now, the amount of coal that is left sometimes may be considerable, may it not?

A. Usually it is not.

Q. Well, sometimes it may be considerable, may it not?

A. Only in very extraordinary circumstances; the general run of cases would be that a ship would get into port with no more than probably three days' coal aboard.

Q. Suppose she is coaled for the round?

A. Well, that is not a thing that is very often done.

Q. Is it not done, and very often done, where there is a coal strike at one end or the other?

A. If you have no alternative, if you cannot put in intermediates, naturally that is all that you can do.

Q. If your old supply of coal can be used up quickly, that is, if it is put in a position irrespective of where that position, if it can be used up quickly, you say you would approve of that, or not?

A. Yes, certainly I would.

Q. Get rid of the coal in two weeks, would that satisfy you?

A. Under certain circumstances, yes; under such circumstances as were described in this vessel I would say no.

Q. I understood you to say that you had fires on two occasions while you were chief engineer?

A. Not while I was the chief, I didn't say.

Q. While you were at sea; I beg your pardon.

A. Yes, sir.

Q. Was that fire—were those fires both in the bunkers?

A. There was three instances; two in the bunkers and one in the hold. The one in the hold was very small, almost negligible fire.

[fol. 258] Q. Was there any new and old coal mixed in your bunkers?

A. That I do not remember. That circumstance, that instance, was in 1911, and the other is in 1914, so I do not just remember what the coal was.

Q. You don't remember whether—what the circumstances were with respect to the age of either of the coals was on the two occasions when you had fire, when you were at sea, I mean the bunkers as distinguished from the hold.

A. No, except that in the case of the one in 1911, I know the ship was in a—had loaded bunkers on the Tyne, and then had gotten some more in Cardiff, and that ship was in the habit of loading enough coal then in Las Palmas to bring her around, the round trip back to Las Palmas.

Q. And all of that indicates what?

A. Well, I mean that is all I can remember about it; I do not remember—I could not say how the coal was under those circumstances.

Q. Have you been aboard a good many ships sailing out of this port?

A. Yes, sir.

Q. During the time that you were aboard the ships, have you ever seen a temporary wooden—a wooden bulkhead used in connection with a coal bunker?

Mr. Jones: If your Honor please, I object upon the same ground that I enumerated before when the matter of usage was taken up; and I further call your Honor's attention to the case of the American Coal Co. against DeWese, 30 Fed. 349, the opinion of the Circuit Court of Appeals of the Fourth Circuit, in which he said:

"On these questions, we think the Court was right in [fol. 259] excluding the testimony offered. In the light of the admitted physical facts that existed in connection with

the waste pile, it seems clear that usage and custom with regard to other waste piles built under different or even similar conditions, no matter how well established, could not excuse the defendant from negligence in the way in which the waste pile was built up."

And then further he says:

"A negligent act, clearly shown to be such, cannot be justified on the ground of custom or usage, and evidence of such custom or usage is not usually admissible for that purpose. The broad rule has often been asserted that usage and custom do not justify nigligence, and obviously the fact that the defendant has been habitually careless and asserts a usage to be exempt from the legal consequences of his negligence, is of no avail. Where the usage or custom is invalid by reason of its unreasonableness, unlawfulness, or the like, and is productive of injury, the generality of the custom cannot in any given case in any degree excuse or justify the fact."

And I object, if he intends to offer this evidence on any such theory.

The Court: The rule that I have made and make on this occasion, is not at all at variance to that rule as I understand it. This is merely for the purpose of establishing what persons of ordinary diligence would do. If it were found that what was done here by the respondent was negli-
[fol. 260] gent, I would certainly not think that the mere fact that it was custom to do negligent acts, would relieve them of responsibility.

Mr. Jones: That is all I am making clear about this, that is the real point that I wanted to bring out.

The Court: It seems to me perfectly proper in determining one of the elements of whether there is negligence or not, that I have to determine what ordinary persons would have done, and if he can establish a general custom throughout the trade, seems to me that that is evidence bearing on the question, not conclusive, but bearing upon the question of what ordinary persons would have done with the degree of responsibility that this respondent had. I note an exception in your favor, Mr. Jones.

Mr. Keating: May I have the last question and answer of the witness and the following question then read:

(The reporter then read as follows:

"Q. Have you been aboard a good many ships sailing out of this port?

A. Yes, sir.

Q. During the time that you were aboard the ships, have you ever seen a temporary wooden—a wooden bulkhead used in connection with a coal bunker?")

A. Yes, sir.

Q. Is it a usual thing, or not?

A. It is quite common where there are extraordinary conditions arising, necessitating carrying more bunkers than the ship is ordinarily fitted to carry.

[fol. 261] Q. There are a good many ships doing it, aren't they?

A. There are a good many ships doing that, where they can't get the coal for the trip, where they want to store it.

Q. I understand that you have two suggestions, in order to solve this problem, and if I am wrong, correct me: One, is to exclude air altogether; and two, otherwise to give a constant supply of air through the coal.

A. You are wrong there on my statement.

Q. I want to be corrected; what did you say?

A. My statement was that you were to exclude any air coming in except from whatever surface ventilation you may give it by opening up the hatch while the man is in there. In other words, that you provide air simply for the purpose of getting rid of the dangerous marsh gas that may accumulate, and in not allowing air to go in there which might be obtainable for the coal for spontaneous combustion through a supply of oxygen.

Q. In other words, that is your view, that the coal should have no air, and it is necessary, so far as possible, it is necessary to take off whatever gases accumulate to prevent explosions?

A. Yes, sir.

Q. So that you are satisfied with any surface ventilation which takes off the coal gases?

A. Yes, sir.

Q. And you do not want any more of that than is necessary?

A. I do not want any more of that than is necessary.

Q. If you do not have an explosion you are satisfied? That is, if it does not create an explosive condition you are satisfied with the ventilation, and that is the only thing that you look to, as regards surface ventilation.

[fol. 262] A. Surface ventilation—sufficient surface ventilation to get rid of the gas so there will be no explosion, and thereby cutting down the amount of air in your bunkers to a minimum, just enough for the man to be able to work in there and get rid of any gas that may be accumulated.

Q. And you did not say that there was any bunker constructed that excluded all air altogether, I have not in here that you did not say that.

A. No.

Q. There was no such bunker and there is no such bunker constructed, or compartment, aboard a ship?

A. I have never heard of any.

Q. There is always some air in every part of the ship, is there not?

A. That is everywhere but your double bottoms.

Q. I am talking about the places where people ordinarily go into.

A. They all have air more or less.

Q. How would you supply—if that is not possible, to exclude all the air, or sufficient air to comply with your condition No. 1, what is your suggestion for furnishing adequate air supply? How will that be done on vessel bunkers?

A. Provide your bunkers—naturally your sides will be tight, provide steel bulkheads at the ends, and then simply open up your hatch on top, and a ventilator will answer the same purpose.

Q. Do you mean to say that that will supply—that that arrangement will supply a complete current of air sufficient to carry off all heat and so forth that has been described here?

A. Yes; I know that it absolutely will, by my own personal experience.

Q. Well, now, what was your experience; let us get at that. You mean you did not have a fire?

[fol. 263] A. No, I mean my own personal experience going to sea for between 5 and 6 years. The idea that you have got to have a circulation of air going through there like a draft of air through a bunker all the time, is absolutely wrong. You are not supposed to have any such thing, because you cannot lay your coal in a condition there to have your air able to go through to provide the necessary cooling effect, because as long as you have an outlet the gas itself will get out, because, due to the fact that it is very much lighter than air, it will always be up on the under side of the deck, and will take the avenue of least resistance, getting out, and any heat that is generated in that bunker will naturally make that gas expand and it will make it all the quicker go out.

Q. Leave out the cause for the minute, because, of course, I may be wrong; but I thought that you might disagree with Prof. Parr and Dr. Porter: Is it my understanding that dealing with the coal as such, never mind the gases, dealing only with the supply of oxygen and the heating, possibly I have not got the proper descriptive word, ventilation I would call it.

A. No, I am in favor of no ventilation on the coal at all.

Q. I have not got to the explosion point that we spoke about, but have reached simply the subject of ventilation of some sort; are you satisfied that it would work out satisfactorily, from your experiences?

A. That is, a surface ventilation, my statement was.

Q. You haven't any idea, I take it, have you, of running a current of air through the coal?

A. No, sir, because I do not think it can possibly be done, not satisfactorily, certainly no shipowner is going to place his coal into layers so as to provide cooling ventilation [fol. 264] through it, it just is not done.

Q. Am I wrong when I understood you to testify to a question by Mr. Jones, that you were in favor of excluding the air in so far as possible, that was No. 1, and No. 2, furnishing a full and constant supply through the coal?

A. If it could be; but in my opinion it cannot be done, and is not practicable.

Q. So that your suggestions really come down to one?

A. To one.

Q. And you are in favor of excluding all air so far as possible?

A. From going through the mass of the coal.

Q. From going through the mass of the coal, and supplying some kind of ventilation which will take off the coal gases?

A. Right.

Q. Is that correct?

A. Yes.

Mr. Keating: I have no further questions of this witness.

WILLIAM G. MCLENNAN, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

The Court: Would you rather stop now?

Mr. Jones: I will finish with this witness, if your Honor please, and then stop; I don't think it will be very long.

Q. Capt. McLennan, will you give us a short account of your experience as shipmaster and marine surveyor?

[fol. 265] A. I went to sea in 1877 and became master in 1887, and was master through until 1917. In 1917 I brought a ship out to this side, and I left her, and I joined the Firemen's Fund Insurance Co. as surveyor. I was with the Firemen's Fund for about 7 years, and they gave up hull insurance, and I went out on my own, I think it was, November, 1923—I won't say whether 1923 or 1924.

Q. Since that time you have been in practice as a marine surveyor?

A. On my own. I was such since 1917, a marine surveyor.

Q. You hold a master's license?

A. I do.

Q. British master's certificate?

A. A British master's certificate.

Q. How long have you held that certificate?

A. I think I got it in 1885.

Q. During the course of your experience, have you had anything to do with coal and cargoes of coal?

A. I have carried coal in sailing, and I have carried coal in steam.

Q. What kind of coal have you carried?

A. Well, I have carried Welsh coal, I have carried North Country coal, I have carried Lancashire coal, and I have carried Australian coal.

Q. Ever carry any American coal?

A. Oh, yes.

Q. You heard any questions I put, did you, Capt. McLennan, to Dr. Porter?

A. I did.

Q. Are you in a position to state whether or not you could form an opinion as to the contributing causes of the fire which I mentioned in that question?

A. Yes.

Q. What in your opinion were the contributing causes of that fire?

A. Well, I would consider one of the main contributing factors, putting new coal on old coal, that probably there was some heat in the old coal, that was not dispensable after [fol. 266] taking the new coal on top of it, which would increase it.

Q. What was the other contributing causes?

A. According to—I am going now more by my chemical experts——

Q. No, no; you cannot tell what somebody else has said, I am talking what you know.

A. We always understand—my information is all from this Board of Trade pamphlet, Lloyd's pamphlet, which we get at every port we are in, a British shipmaster gets them from the British shipping offices in England, or the British consul, they publish what they call "Notice to Mariners", which was always given to shipmasters free. It has many titles and lots of them are entitled, "Dangers of Coal", and anything like that that is gotten out by the Board of Trade, and the Board of Trade I know—I know that the Lloyd's publish it, I know I have seen it in their calendar for 1913, about the study of coal and the circulation of air through it, and the surface circulation, so that is what I am working on on that, I must take superior knowledge to mine.

Q. You don't know anything about it of your own knowledge?

A. No, sir, no more than I know I have tried to follow out these rules.

Q. Have you ever had any experience with coal fires?

A. Yes, I have had one or two very serious ones.

Q. What were the nature of those fires?

A. I loaded once a cargo of coal in Norfolk, for Cavite. I had instructions to go into Durban and take more bunkers, so we had gone out around the Cape of Good Hope. My owners' instructions were to take on bunkers at Durban or Port Natal, which was the same thing. I went there and [fol. 267] filled my bunkers, and three days afterwards I was beautifully on fire.

Q. That is, you put fresh coal on top of old coal?

A. I did as I was told in that case; I just filled my bunkers.

Q. Who told you to?

A. My instructions from my owners, gave me instructions, and I cannot say now whether it was the owner or superintendent; but I know I got a letter in Norfolk that I was to call at Durban and fill my bunkers.

Q. Did you have any other experience with fire at all?

A. During the Boer War I was on the transport service, and we used to take coal when we were carrying troops and horses, the lower holds were free, so we used to put coal in our lower holds and work out on the passage home from South Africa, either home or to New Orleans, whichever way we were going for bunkers. About 8 days before I arrived in Cape Town, on one occasion my chief officer woke me up one morning about 6 and told me that we were on fire. He said we were on fire, and I said "Where?" and he said No. 2. I told him to close the hatches, and tarpaulin them down, those were the lower hatches, because we had horses on board, and then put a full set of hose which we had, into the holds and leave them in there, and in about an hour's time the hatches all blew off, and then we had nothing to do but to keep our hose in there. Well, I arrived in Cape Town, it was 9 or 10 days afterward, and I wanted all my horses discharged there, and the Colonel in charge of this, he asked me how long I had been on fire, and I told him 10 or 12 days, and he said, "You have kept it under this long; go around to East London and discharge them there". I got around to East London and then we took all the coal [fol. 268] from under these hatches into this deck and spread it out three or four feet high, where we had had the

horses, because we had the space then, and that was the action on that.

Q. Did you ever ascertain the cause of that fire?

A. No, I never ascertained the cause of it.

Mr. Keating: Now, I move to strike out the entire answer.

The Court: I should think that is the last thing in the world you would want to do. However, I will strike it out if you want.

Mr. Keating: I don't care one way or the other.

A. (Continued.) I cannot say what caused it.

By the Court:

Q. You cannot?

A. No; it was on fire; that was all I know.

Q. That is not an unusual thing, is it?

A. No, sir, it is not.

Q. Well, it is not unusual to have fires in coal without anyone ever being able to tell what caused them?

A. Fires vary in various classes of coal. That is what is known in England as North Wales coal, that is a coal which fires much more quickly than South Wales coal. The various mines vary.

Q. All bituminous?

A. Yes, always.

Q. How about American coal; does that fire easily as Wales?

A. It is considered about equal to South Wales coal, among seafaring people. South Wales coal is safer than North Wales. All coals vary in their spontaneous—their [fol. 269] propensity to ignite, the different kinds vary. That is what my experience has been.

By Mr. Jones:

Q. Did you ever have any experience with limbers in underneath the coal?

A. Limbers?

Q. Yes.

A. Yes, that is coal, that is this coal, three days after I left Durban, it was over the limbers, that is where it started.

Q. What is the limbers?

A. The limbers is the place in a British ship, they are not all the same, some of the American ships are not built that

way, they run right out to the ship's side. In British ships, the tank goes out and goes so far down and goes as you might call it to a drain along the ship's side.

Q. Gutter?

A. Gutter, if you like.

By the Court:

Q. Inside of the hold?

A. Between the ship's skin and the tanks, and if there is any water gets on your ceiling, it runs into this place and then it is pumped out from the limbers or the bilges.

By Mr. Jones:

Q. You say this fire started over the limbers?

A. Right over these limbers, this fire, after we left Durban.

Q. Was the limbers plugged up in any way?

A. Only boarded over, I supposed the coal would not get there, though it seems it often does get there.

Q. The air could get through the limbers?

[fol. 270] A. The dust comes through, and the air would go through, yes.

Mr. Jones: You may cross-examine.

Cross-examination.

By Mr. Keating:

Q. Captain, are you familiar with the practice in the Harbor of New York about carrying coal by using wooden bulkheads?

Mr. Jones: May I have my same objection to that, your Honor?

The Court: Yes, and objection is overruled and you may have an exception.

A. Carrying coal?

Q. Yes, carrying of coal.

A. How do you mean, carrying coal in the Harbor of New York? We do not carry it in the harbor; we load it in the harbor. Is that what you mean, sir? I want to get at what you mean.

Q. Yes, thank you very much; I want to make my questions clear. You will have to excuse me, Captain, if I ask a few absurd questions, to a man of your experience.

A. Thank you.

Q. What I am trying to get at is whether you are familiar with the practices of shipowners in the Harbor of New York, loading coal bunkers for the use of ships; have I used the correct term?

A. Well, I have loaded coal and I have taken bunkers on.

Q. I have asked you, Captain, are you familiar with the practice?

A. I don't know of any—I never worked for any American shipowner in the way of loading coal.

[fol. 271] Q. Have you ever worked for any shipowner?

A. Yes, but I have not for owners here.

Q. You have been around the Harbor of New York a great deal in these last few years as a marine surveyor, I know.

A. Yes, I have.

Q. Have you seen any coal loaded behind wooden bulkheads?

A. You mean bunker coal?

Q. Yes.

A. Yes.

Q. It is the usual practice, isn't it?

A. It is done at times, yes.

Q. Is it not, or is it, the usual practice?

A. No, I won't say it is usual; it is only on certain occasions.

Q. It is quite a common practice?

A. Well, it is done commonly on certain occasions.

Q. Now, suppose, Captain, I want you to answer this question, that when you got to Durban—is that the place where you took this additional coal, these additional bunkers?

A. Port Natal or Durban, it is the same thing.

Q. You were told to take some more bunkers there, were you?

A. I was told to fill up my bunkers, what I burned from Norfolk to there.

Q. Did you have bunkers that would have carried you through?

A. As far as I remember I think I would have had sufficient to carry me to Cavite.

Q. If you had been left to your own resources, would you have thrown that coal that you had taken on at Norfolk, away?

A. Never heard of a man throwing away coal, on board of ships.

Q. What would you have done with it, if left to your own resources?

A. Burned it.

Q. That is what you did, wasn't it?

A. Well, I don't just get what you are driving at.

[fol. 272] By the Court:

Q. He means, in regard to building up your bunkers at Natal.

A. Why would I throw it away?

Q. What would you have done with it?

A. Burned it in time; I don't exactly get your point here.

Q. Captain, listen, you had a certain amount on when you went into the harbor of Natal?

A. Yes.

Q. You were going to fill up?

A. Yes.

Q. What would you have done if the owner, the people that you were working for, had not given you any instructions, under that circumstances you would have burned it?

A. I don't know, I could not burn it all at once; I would have burned it in time, sir.

By Mr. Keating:

Q. Now, did you consider it proper to burn that coal that you had left, in time?

A. Yes, sir, I would — burned it in time.

Q. Would you consider it good practice on board ship, to sort of work out your bunkers alternately; is that what you call it? —would that be good ship practice?

A. What do you call the alternate?

Q. I mean that if you are going to carry coal out, actually carry out a coal from one bunker, would it be sensible thing for a chief engineer to do, to arrange it so that he

worked out his bunkers alternately, so that he used up his—he kept his coal in rotation, so to speak. Would you consider that good practice?

A. I cannot see it! I have never been in a ship that had [fol. 273] more than two bunkers or three at the very most, and any captain who would take it all out from one side, you might turn your ship over.

Q. Depend a little, would it, on the size of the bunkers?

A. Yes.

The Court: May I ask a question, will you excuse me for interrupting you?

Mr. Keating: Yes.

By the Court:

Q. What would you do, captain, if you had a mass of a couple of hundred tons, or three hundred tons of coal in your bunkers, and you had to put in more coal, because 300 tons was not enough to bring you where you wanted to go, you had to put in some more, what would you do under those circumstances?

A. Well, I know what I would like to do, but I could not always do it.

Q. What would you like to do?

A. I would like, if I were able, to put that coal where I could use it first, before I used the other coal; but you cannot always do that.

Q. You mean, to take it out of the bunkers?

A. If you have any other place to put your extra coal, to put it there so that it does not get mixed; but we have another rule aboard ship, "Obey orders."

Q. I am not talking about your matter at all; I understand that. But I would like to know what the wisest and careful captain would do under those circumstances?

A. He would keep the coal separate if he possibly could.

Q. And by "separate", do you mean to take it out of the bunkers and put it back, or something?

A. No, sir; if you have a separate bunker that you could [fol. 274] put it into, then you would; but if you were told to take in and put it in your bunkers, why, you get the orders, and you have to follow them.

Q. Suppose you had no other place you could put the coal that you had in, the 300 tons, that you had no other

place except the bunkers that it was in, and you had to take aboard some more coal, what would you do with the coal you had on board already?

A. In that case I would just have to leave it and put it over it, in a case like that.

Q. Is there any special treatment you would give it, or just cover it with the new coal?

A. No, sir, there is not.

Q. Nothing you can do?

A. Nothing you can do.

Q. Just dump it in?

A. Just dump it in.

Mr. Jones: If your Honor please, I think that is all I have for this witness.

The Court: Then we will adjourn until tomorrow.

Mr. Jones: I think I will probably rest and keep the rest of my testimony for rebuttal. I would like your Honor to consider the matter of letting me discuss it with my associates. I do not think that I care to offer any more evidence now, and I think I will probably rest as it stands now, and save the rest of my evidence until after I hear what my opponent has to say.

The Court: You will be faced with the objection, I suppose, on the part of your opponent, that you put your en- [fol. 275] tire case in now, that is, you put in all of your direct case, unless he is willing to let you do that; I don't know.

Mr. Jones: I think my direct case is made out, and any other testimony I shall have will be in the nature of rebuttal.

The Court: That is, it won't be cumulative of what you have offered now?

Mr. Jones: What I want to do is to find out what his witnesses are going to say, and then reserve these other witnesses.

The Court: That is what I will have to pass upon, your right to do that. I would have thought that the regular practice would have required you to put in all your evidence on your direct case and then anything that is strictly rebuttal could be put in after his case. If you have something that is admissible on your direct case, then I suppose it has got to go in now.

Mr. Jones: I think, if your Honor pleases, I have made out a case on direct. For the moment I am satisfied with it, and I would therefore prefer to hold my other witnesses here until after my friend puts on his case, and I will be in a position to rebut it, my understanding to be that my rebuttal will of course be directed to what he shall put in.

The Court: Yes, strictly rebuttal.

Mr. Keating: Do I understand you rest, then?

Mr. Jones: I will let you know that in the morning.

The Court: Then we will take a recess until 10:30 tomorrow morning.

[fol. 276] (Whereupon a recess was taken until Friday, November 8th, 1929, at 10:30 o'clock A. M.)

New York, November 8, 1929.

Met pursuant to adjournment at 10:30 A. M., present as before.

Mr. Jones: I am quite satisfied with my case, if your Honor please. I find I only failed to file a stipulation of facts, which I now file.

(It is marked Libelant's Exhibit 20 in evidence.)

Mr. Jones: I have rested my case, if your Honor please.

CASE FOR RESPONDENT

FREDERICK ELLISON, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination,

By Mr. Keating:

Q. Mr. Ellison, are you a mariner?

A. Yes, sir, I am a mariner.

Q. How old are you, Mr. Ellison?

A. I am 37 years of age now; the 7th of April, 1892, I was born.

Q. How long have you been going to sea?

A. What—you mean to earn my own living?

Mr. Jones: Would you mind removing your hand from your mouth?

The Witness: Certainly.

[fol. 277] A. (Continuing:) You mean since I have left school?

Q. How long all told?

A. Since I was 15 years of age.

Q. And you have been to sea practically ever since, have you?

A. Ever since, sir.

Q. Do you hold any license?

A. Yes, sir.

Q. What license do you hold?

A. I hold a master's certificate.

Q. From whom?

A. English, the British Board of Trade certificate.

Q. Is it unlimited?

A. Any part of the world, yes, sir, unlimited.

Q. Before you got that master's certificate did you work yourself up from one grade to another?

A. Yes, sir.

Q. Were you the chief officer of the "Galileo" at the time she had the fire?

A. Yes, sir.

Q. How long had you been chief officer of the "Galileo" at that time?

A. I joined her December, 1925.

Q. Your home is in England, Mr. Ellison?

A. Yes, sir, in Hull, Yorkshire.

Q. Will you tell us generally what kind of a steamer the "Galileo" was?

A. Well, she was a general cargo ship.

Q. How many holds did she have?

A. She had six holds and six hatchways.

Q. A steel steamer?

A. Steel steamer, yes sir.

Q. Do you know what, about, her gross and net tonnage was?

A. I can't give it to you within a couple of ton; she was 4090 tons net register and about 6300 tons gross.

Q. Now, during the Spring and Summer of 1926 was there any unusual condition that you know of in England, about coal?

A. You mean the coal strike?

[fol. 278] Q. Yes.

A. Oh, yes, there was a coal strike in England.

Q. Had you served on any other of the Wilson Line vessels than the "Galileo"?

A. Yes, sir.

Q. What were they?

A. You mean the names of them?

Q. Yes.

A. I was on the "Morocco", the "Gautano", and the "Vigo".

Q. Had you been in that New York-Hull trade for some years?

A. No, sir.

Q. Was your experience on the "Galileo" the first time you were in this trade?

A. Yes, sir, in this country.

Q. Now, prior to June, 1926, that was the first time you coaled for the round in New York, was it?

A. That is right, sir.

Q. Prior to that time where did you take your coal on?

A. While I was on the ship we used to take it in England.

Q. And do you know the capacity of the bunkers, permanent bunkers, roughly speaking?

A. Not the permanent bunkers. I have nothing to do with bunkers.

Q. What parts of the ship used to carry the coal prior to June when you coaled for the round in England?

A. When we coaled in England, you are talking about?

Q. Yes.

A. After finishing up the permanent bunkers we used to put the remainder down in No. 3 lower hold.

Q. And when you got to New York what did you do with the coal that was in No. 3 lower hold?

A. The laborers come on board and they used to take it out of No. 3 hold and put it into the bunkers.

Q. Was that the usual practice on each voyage?

A. While I was on that ship, yes sir.

[fol. 279] Q. In June, what time did you arrive, in June?

A. I couldn't tell you what time.

Q. Look at the log and give us the exact date. I think we may as well be exact about this. (Handing witness log-book.)

A. June 21st.

Q. Now, upon arrival in New York on June 21st on that trip had there been a coal strike in England? Was the coal strike on at that time?

A. In England, yes, sir.

Q. Now, had you brought over any coal in that lower No. 3 hold on that trip?

A. In June?

Q. Yes.

A. No.

Q. At that time when you arrived was there any coal in No. 3 between decks?

A. No, sir, no, sir.

Q. What did you load in June, in No. 3 lower hold?

A. In June, in No. 3 lower hold—grain in the No. 3 lower hold.

Q. Did you have anything to do with the loading of that grain?

A. It was my job, sir, to see that it was well trimmed.

Q. And did they fill the whole hold up with grain?

A. Absolutely.

Q. After it was filled up with grain did you go down into the between decks, that is, over that lower hold?

A. I have to be down there to see that it is well trimmed. I was down there all the time.

Q. What did you do with respect to covering the hatch which leads from No. 3 between decks into the hold?

A. I battened it down.

Q. How did you do that?

A. I put the hatches on, those wooden things, you know.

Q. The wooden hatches?

A. You put the hatches on first.

Q. Yes, and then?

A. Then two tarpaulins over.

[fol. 280] Q. What did you do to the tarpaulins?

A. There was no lugs round the sides; I put battens, what we call cargo battens, we used them for dunnage, and I put down round the sides and nailed it down. I didn't do it myself.

Q. Who helped you?

A. I was down there helping. I was the chief officer, but I was there and the carpenter did it; I saw that it was done.

Q. I am still speaking of June. When you got done battening down the grain hold was there anything at that time in No. 3 between decks, in June?

A. Nothing at all, sir; it was all swept out.

Q. Will you look at these exhibits, which are Exhibits 10, 11 and 12, which were put in evidence by Mr. Jones, drawn by Mr. Bagger, and tell me whether in a general way those exhibits represent the position of the various places in the ship in the general neighborhood of No. 3 between decks, No. 3 shelter deck and No. 3 lower hold?

A. Well, it is my belief that this wooden bulkhead in the shelter deck is too far forward, the wooden bulkhead.

Q. Let us see which paper you are talking about; wait a minute.

(The witness is speaking of Exhibit 10.)

Q. Now will you indicate which one you think is too far forward?

A. It is my belief, that is in what I call the shelter deck. (The witness points to the bulkhead.) In my belief it is a bit too far forward.

Q. The wooden bulkhead which I have marked on there with an F is the one you think is a little too far forward?

A. Yes, sir.

Q. Is otherwise Exhibit 10 approximately correct, as far [fol. 281] as you can judge?

A. To the best of my knowledge I should say it is right, sir, that is, as far as I can tell.

Q. Now look at Exhibit 12 and tell us whether that is approximately correct as far as you can judge?

A. This is what I call the shelter deck?

Q. Yes—is that approximately correct?

A. Just a minute. I think it is correct within a few feet. Will that do?

Q. That is all right. Now will you look at Exhibit 11 and tell me whether that is approximately correct, that is marked lower between decks; you call that the between deck, do you?

A. Yes, sir; yes, sir.

Q. Is it too far forward or too far aft?

A. It is too far forward, if this is the shelter deck. (Witness indicates.)

Q. You are referring to Exhibit 12?

A. Yes. As I said in the first instance, that bulkhead was a bit too far forward. (Indicating F on Exhibit 10.)

Q. Other than that you think the things are approximately correct as far as you can tell?

A. As far as I can tell, sir.

Q. Now, Mr. Ellison, I show you Exhibit 10, which shows a profile plan of the "Galileo", and I want you to look at the space B and tell me the approximate dimensions of that space.

A. The approximate dimensions?

Q. Yes.

A. The approximate length of that is you mean from the bulkhead?

Q. Yes.

A. The approximate length of that is 33 feet, that is in the between decks, 33 or 34 feet.

By the Court:

Q. Do you mean from the bulkhead to the wooden feeder [fol. 282] in the back, or back of the steel bulkhead? From here to here, not from here to here? (Indicating.)

A. No, sir.

Mr. Jones: What he means is from C to G; is that correct?

By Mr. Keating:

Q. Is that correct?

A. Yes, sir.

Q. Now, how deep is No. 3 between decks from deck to deck, the space marked B?

A. How deep? Within a couple of inches it is 10 feet.

Q. Now, will you look at the bulkhead in Exhibit 10 marked G and describe that bulkhead to his Honor; the bulkhead marked G at the after end of No. 3 between decks? Just describe it.

A. In the way of the No. 3 hatch?

Q. Yes.

A. This hatch here, to the side of the coamings extending through the deck, it is of steel.

Q. You mean the bulkhead is steel in the way of the hatch?

A. In the way of the hatch.

Q. Now, what is on the other side?

A. On either side is wood, sir.

Q. Are there any openings in that wooden part on either side?

A. Yes, sir.

Q. What are they?

A. There is one door on one side, what I call a door, and one on the other side, one on each side.

Q. When you left New York in June what was on each side of that bulkhead, that is, the after bulkhead which you have just described?

A. When we left in June?

Q. Yes.

A. It was full of coal.

Q. On each side?

A. On each side.

[fol. 283] By the Court:

Q. Behind the wooden parts?

A. Behind the wooden parts, yes, sir, and in between decks on both sides, it was like one mess of coal.

By Mr. Keating:

Q. Was it also against the steel on each side?

A. Through the between decks?

Q. Yes.

A. No, it couldn't be, wood at the 3 between decks.

Q. Now, will you look at the bulkhead at the forward end, marked C in No. 3 between decks and describe that bulkhead to us?

A. The bulkhead in No. 3 between decks on the forward end?

Q. Yes.

A. I might not be a bit clear in my explanation—that wood bulkhead was composed of planks of an average width of 10 inches; the width of the planks was 10 inches.

Q. How were they laid?

A. They were laid close together vertically from deck to deck.

Q. One plank laid alongside of the other?

A. Absolutely close to each other, not laid alongside, but close up to each other; the edges of these planks in the first place had been planed smooth to make it a close fit, and jammed up close to each other.

Q. From deck to deck?

A. From deck to deck.

Q. Now, was there anything else about those bulkheads?

A. Where they meet on each side, on the forward side and the after side, there was what we call cargo bulkhead battens, one of the coal part and one on the after part over these seams.

Q. Where each plank met the other plank?

A. Where the two met.

[fol. 284] Q. And how were they put on the bulkhead?

A. They were run back, with wire nails.

Q. Was there one of those strips on each plank?

A. Absolutely.

Q. On the forward side of the bulkhead?

A. And on the after side too.

Q. Is there anything else about that bulkhead?

A. With the bulkhead itself?

Q. Yes.

A. Where it was at the deck head it had stiffeners right across on each side, you know, where it touches the deck.

Q. Yes.

A. On each side there was a thick piece of wood square, like a sort of a stiffener.

Q. On either side?

A. On either side at the top, and the same at the bottom; that is to strengthen the bulkhead.

Q. Now, in the June voyage did you put any coal in No. 3 between decks?

A. In the June voyage?

Q. Yes.

A. Yes, sir.

Q. Did you put some in the shelter deck also?

A. Yes, sir.

Q. Filled those spaces up?

A. Filled them up.

Q. Now, on the June voyage what was forward of the wooden bulkhead which separated No. 3 between decks from No. 2 between decks?

A. On the June voyage?

Q. Yes—was there any cargo there?

A. Oh, yes, there was cargo in the forward part.

Q. Do you remember at this time exactly what the cargo was?

A. Not on the June voyage, not on the June voyage.

Q. What was one of the purposes of putting up that bulkhead which separated the No. 3 between decks from No. 2 cargo space?

A. From No. 3 between decks——

[fol. 285] Q. From No. 2 cargo space.

A. What was the object of it?

Q. Yes.

A. To divide the space into two parts.

Q. Had it anything to do with the protection of cargo?

A. It certainly protected the cargo.

Q. Against what?

A. Against the dust.

Q. What dust?

A. The coal dust.

Q. Now, did you see the cargo discharged at the end of the June voyage out of No. 2 between decks where it had been against the bulkhead separating it from the coal?

A. I didn't see it discharged, but I was on the ship.

Q. You don't know whether there was any damage to it or not?

A. I should have known if there had been.

Q. You can only say what you saw yourself.

A. They told me everything was O. K.

Mr. Jones: Objected to, and I move to strike it out.

Mr. Keating: I consent to that.

The Court: Strike it out.

Q. Have you any job on the ship in that connection, with that particular bulkhead, have you any duties—what are your duties?

A. My duty is to see that that bulkhead is in good condition.

Q. Did you inspect it in the June voyage?

A. I did inspect it, sir.

Q. Tell us how you inspected that bulkhead in the June voyage.

A. In the June voyage before we put the coal in?

Q. Yes.

A. The between decks, you are talking about?

Q. Yes, No. 3 between decks.

A. I go in the between decks and I go closely over it along [fol. 286] with the ship's carpenter, I examine the bulkhead battens and see that there is none knocked off by perhaps cargo or slack, you know, and then I make it a practice of testing that by getting two or three clusters down with lights on, see?

Q. Yes.

A. And when it is dark, two or three clusters, I put down, and shine it on this bulkhead when I am on the other side; I get a couple of the crew to shine it on the bulkhead when I am on the other side, to see if there are any cracks or openings, for if there were I should see the lights in between.

Q. Did you do that on the June voyage?

A. I do it every voyage, sir.

Q. Did you do it on the June voyage?

A. Yes, sir.

Q. That bulkhead is not watertight, is it, that wooden bulkhead?

A. What do you mean by watertight, sir?

Q. Well, what do you mean by watertight?

A. I mean if you throw a bucket of water at it it wouldn't go through, but if there was a large volume of water on the side it would crush itself through, perhaps.

Q. What have you to say as to the bulkhead, about air passing through? Some air would pass through, wouldn't it?

A. Yes, some air would pass through.

Q. Would ventilation go through?

Mr. Jones: I object, if your Honor please; I don't know what Mr. Keating means by ventilation going through.

The Court: Objection sustained.

Q. Was that bulkhead so constructed to resist ventilation?

[fol. 287] Mr. Jones: Objected to.

The Court: Objection sustained. Strike it out.

Exception.

Q. Can you form any opinion, Mr. Ellison, as to whether there would be a large or a small quantity of air go through that bulkhead?

A. A very, very small quantity of air.

Q. Would a larger or smaller quantity of dust go through?

A. It was absolutely dust-proof.

Q. That was the purpose of the bulkhead?

A. Absolutely the purpose of the bulkhead.

Q. Now will you look at Exhibit 10. This thing that I point to with my pencil is what?

A. That would be the ventilator.

Mr. Keating: Can I mark that with the word "ventilator"?

The Court: Yes.

Mr. Jones: Is it marked on there now?

Mr. Keating: No. I marked it "Vent".

Q. Now, was there a ventilator on each side?

A. On each side, sir.

Q. Now, how far apart were those ventilators?

A. How far apart?

Q. Yes.

A. Well, from the hatch coaming to the side of the ship we will say in the center, as near as I can possibly estimate it was in the center from the side of the hatch coaming to the side of the deck, about half way from the hatch coaming to the ship's side.

Q. How wide is the deck on No. 3 between decks in feet, do you know?

A. If you will tell me the size of the hatchway I can tell you the size of the deck; the breadth of the hatchway?

[fol. 288] Q. 18 feet.

A. Say 6; I am not exactly sure, you know.

Q. You are not exactly correct? Well, don't tell us anything that is not correct.

A. Say 6 or 7 feet from the hatch coaming to the ventilator, 6 or 7 feet.

Q. Now, is that ventilator placed between any of the frames of the ship?

A. Between the frames? What do you mean, the deck frames?

Q. Yes.

A. Yes.

Q. How wide are they?

A. The deck frames, I couldn't exactly say the width of them.

Q. I think it was testified here they were 27 inches.

Mr. Jones: No, they were the frames. He is talking about the deck beams.

Q. You don't know the exact distance?

A. I don't know the exact distance.

Q. Now, do you know what the diameter of that ventilator is at the main or weather deck where it goes down below?

A. The weather deck?

Q. Yes, at the top.

A. Yes, I know.

Q. Well, how much is it?

A. It is 2 feet to 2 feet 2 inches.

Q. And then from there down it is slightly smaller, is it?

A. It is slightly smaller.

Q. How much smaller?

A. Well, from where the intersection is, 3 inches.

Q. Now, what is the diameter of the ventilator at the point where it goes down from the shelter deck into the between decks?

A. I would say one foot one.

Q. And it is smaller when it goes down into the ventilator?

A. Yes.

[fol. 289] Q. What kind of a ventilator do you call that?

A. I should call it a telescopic ventilator.

Q. The idea is that it ventilates only the top of each space?

A. It ventilates each space.

Q. From the top?

A. From the top, sir.

Q. Now, from the time you were on that ship in, I think you said, December, 1925——

A. Yes, I remember that well.

Q. Had they ever had, prior to this voyage, any coal in No. 3 between decks?

A. Not in No. 3 between decks.

Q. From about the June voyage, in which you loaded coal for New York, was that the first time they had ever put coal on the ship while you were on it?

A. In the between decks you are talking about?

Q. Yes.

A. Yes, sir.

Q. You were on the trip that you made from New York—when did you leave New York that June voyage?

A. On the June voyage—it was July 2nd on a Friday.

Q. July 2nd you left New York?

A. Yes, sir.

Q. Does your logbook show when you loaded that coal in New York on what I call the June voyage?

A. The June voyage, it is No. 3.

Q. No. 3 between decks?

A. It doesn't stipulate which is between decks.

Q. What date did you start loading in No. 3 hatch?

A. At 8 A. M. on the 28th of June we commenced loading at No. 1, 3 and 6 holds. No. 3 you are talking about? Yes, at 8 A. M. on the 28th of June, 1926.

Q. And when did you finish?

A. We finished at 1:15 P. M. on the same day.

Q. That is the between decks?

A. You are asking what time we were loading cargo; [fol. 290] this cargo I am talking about in the lower hold, we have got to load that first before we start on the between decks.

Q. I want you to tell the Court when you started to load the coal in No. 3 between decks and the shelter deck on what I call the June voyage; I don't care anything about the cargo.

A. At 7 A. M. on Wednesday, the 30th of June.

Q. And when did you finish—now, this is coal you are talking about.

A. I am talking about bunkers, yes. At 10:30 P. M. we completed the bunkering.

Q. On the same day?

A. The same day, the 30th of June.

Q. What day did you leave New York?

A. We left on Friday, the 2nd of July, sir.

Q. And you proceeded to where?

A. We proceeded to Hull, proceeded to sea.

Q. Now, when did you arrive in Hull?

A. We arrived in Hull on the 19th of June, 1926, on a Monday.

Q. Did you discharge the grain that was in No. 3 lower hold?

A. We discharged it, yes, sir, in Hull.

Q. How did you get at it?

A. Well, first of all, we had the men for to get this here coal from the between decks, to remove a certain amount of coal to get down to the hatch.

Q. How much did you take out?

A. We took enough out for the men to get down and start, we took quite sufficient, and more than sufficient, so as to keep a fair space for the men to go down and commence discharging the grain.

Q. And you took the grain out?

A. Yes, sir.

Q. I have now got you in Hull in July, 1926, and you have taken out your grain?

A. Yes, sir.

[fol. 291] Q. I want to know whether you loaded any new grain in Hull to come back to the United States?

A. No, sir.

Q. Was the coal strike still on?

A. The coal strike was still on.

Q. Now, you came back to the United States, did you?

A. Yes, sir.

Q. When did you arrive back in New York?

A. We arrived back in New York on the 17th of August, 1926, that was on a Tuesday.

Q. Did you, while the vessel was in the Port of New York—and I am now talking about the August voyage from here on—did you go down in the No. 3 between decks and No. 3 shelter deck?

A. Yes, sir.

Q. Was there any coal in the shelter deck remaining?

A. Yes, there was coal in the shelter deck.

Q. Was that coal that had been put on there in the June voyage that you described?

A. It was the coal that we took on in New York.

Q. Did you go down in the No. 3 between decks?

A. Yes, sir.

Q. Was there any coal in there?

A. Yes, sir.

Q. Can you give us a rough idea of how much there was?

A. Well, from going backwards and forwards down there I should imagine about 150 ton in the between decks.

Q. Now, how was that coal lying in No. 3 between decks as far as you could see?

A. It was lying—you mean the position of it?

Q. Yes.

A. From the forward wood bulkhead, as near as I can judge—what I have in my mind's eye, it was about 3 feet down from the deck head, the top of the coal, and it came down in a sort of a slanting pile.

[fol. 292] By the Court:

Q. To the forward bulkhead?

A. To the forward bulkhead, it came down in a slanting pile.

By Mr. Keating:

Q. The slanting pile led aft?

A. The slanting pile led aft, to the forward end of No. 3 hatch to within, we will say, 4 feet.

Q. Of the hatch coaming?

A. Of the hatch coaming.

Q. Now, when had that coal been put in the ship that was there, this 150 tons?

A. It had been put in in New York.

Q. When?

A. In June, I told you, when we finished bunkering.

Q. Did you load any grain on the trip that you left here in August, was any grain put in No. 3 lower hold?

A. Yes, in No. 3 lower hold.

Q. Did you supervise its loading?

A. I did sir.

Q. Tell us what you did with respect to the hatch looking from No. 3 between decks, leading down to the hold after the grain had been put in?

A. After the grain had been put in?

Q. Yes.

A. Well, I was down there to see them finish off with the grain, to start them, to see that it was well trimmed.

Q. By trimming you mean spreading it out?

A. Yes, sir.

Q. They put trimmers down there?

A. Oh, sure, they put trimmers down there; they have to have them, you know.

Q. Did you subsequently cover up that hatch?

A. I put the hatches on, put the two tarpaulins on, and [fol. 293] battened the thing down with battens round the sides, you know, and nailed the battens down.

Q. So you made that space tight?

A. I made it absolutely secure.

Q. The idea was to keep any coal dust out of the grain?

A. It was, yes, it was, sir.

Q. Look at your logbook and see if you can give me the date that you finished loading the grain and battened the hatch down.

(The logbook is offered in evidence and marked Respondent's Exhibit A of this date.)

A. Yes, I can give you the time and give you the date; that is, for the grain, you are talking about?

Q. Yes.

A. At 8:30 A. M. on Tuesday, the 24th of August, 1926, we commenced loading that No. 3 lower hold.

Q. That was grain?

A. Yes, sir.

Q. When did you finish?

A. At 4:30 P. M. on that same day we completed loading at No. 3 lower hold.

Q. Now, what day was it that you went down and battened down that hatch leading from No. 3 into the lower hatch over the grain?

A. It was on the same day, Tuesday, the 24th of August.

Q. Do you know what day that was?

A. When we finished the grain?

Q. When you went down?

A. I had to be down there to see that it was well trimmed.

Q. You were down there?

A. I was, yes, sir.

Q. Then you went down to see about this battening down of the hatch?

A. Yes, sir, with a carpenter and a sailor.

Q. Now, while you were down there doing that did any- [fol. 294] one come into that No. 3 between decks?

A. When I was battening down I remember, well the chief engineer, coming down.

Q. Anyone else?

A. Shortly afterwards the master came down.

Q. And what did you see them do, what was the chief engineer doing?

A. He was having a look around, looking around at his coal.

Q. And what did the captain do?

A. He came down and he asked me——

Mr. Jones: Objected to.

The Court: Objection sustained.

Q. Tell what the captain did.

By the Court:

Q. What you saw him do and not what he said to you.

A. He didn't do anything; he came towards me and spoke to me.

Q. Is that all? You can't tell us what he said?

A. It was about battening down.

By Mr. Keating:

Q. Did you see him looking at the work that you had done?

A. Yes, sir.

Q. Without telling us what the captain said, did you have a discussion about the battening down of the grain hatch?

A. Of the hatch, yes, sir.

Q. That was what you talked about?

A. Yes, sir.

Q. You had no conversation about the coal?

A. No, sir, not with the captain, no, sir.

[fol. 295] Q. Have you many duties with respect to the coal, the bunkers?

A. Not bunker coal, no, sir.

Q. Whose job is that?

A. That is the chief engineer's job, bunkers; I was mate of the ship.

Q. Do you know anything about bunkers particularly?

A. No, sir.

Q. You are not a college professor?

A. No, sir.

Q. You have never studied chemistry?

A. No, I have nothing to do with bunkers whatever. I go for cargo and see that it is stowed in good condition.

Q. You are the mate?

A. I am.

By the Court:

Q. Were you the first mate?

A. Yes, sir.

By Mr. Keating:

Q. Now, did you make any special inspection of the coal?

A. No, no special inspection of the coal.

Q. Did you sit on any of it?

A. I sat on it; that is what I had to do when I was battening the hatch.

Q. You sat on a part of it?

A. Yes, for the side of the hatch was very hot.

Q. Did you receive any severe burns on the place where you sat down?

A. No, I did not.

Q. Was there any fire in the bunker while you were there?

Mr. Jones: I object. The witness obviously can't know.

Mr. Keating: I think this witness is certainly qualified [fol. 296] to tell whether there was a fire.

The Court: Ask him where the fire was.

Q. Did you see any fire while you were there?

A. No, sir, no, I didn't see any fire.

Q. Did you smell any gas?

A. No gas whatever; I didn't smell it.

Q. They didn't load any coal while you were down there?

A. No, for I should have been buried if they had.

Q. Do you know whether there were any men in or out of No. 3 between decks on the voyage over from Hull, commencing July 19th, to New York?

A. In the between decks?

Q. Yes, were there any men there?

A. No, I don't know, I couldn't say.

Q. You were there?

A. I was right through it, right into the lower hold.

Q. Was there any other time later than the time you described when you were battening down the grain hatch that you were in the No. 3 between decks prior to the time they were loading some new coal in there?

A. No, sir.

Q. Was that the last time?

A. When I battened down and everything fixed off below, my job there was finished.

Q. And you went off?

A. I was off.

Q. Now, will you look at your logbook and tell me when they commenced to load the coal in No. 3?

A. We commenced bunkering at No. 3 between decks at 8 A. M., Wednesday, the 25th of August, 1926.

Q. And when did you finish?

A. We completed bunkering at 4 P. M. on Friday, the 26th of August, 1926.

[fol. 297] Q. Did you see them loading——

A. At 4 P. M.

Q. Did you see them loading that coal?

A. No, sir.

Q. You had other duties around the ship?

A. I certainly had, I had plenty of things to do.

(A second logbook is offered in evidence and marked Respondent's Exhibit B of this date.)

Q. Now, what was on the forward side of the wooden bulkhead which separated No. 3 between decks from No. 2 between decks on the August voyage?

A. On the August voyage, in the between decks?

Q. Yes.

A. On the forward part of the wooden bulkhead I spread separation covers on the forward part.

Q. What do you mean by those? What are they?

A. They are what I used for separating different shipments of grain.

Q. What are they made of?

A. They are made of, as near as I can tell you, they are about the size of a good sized tarpaulin, and they are made of—it is thicker than bagging, you know bagging, but it is thicker.

Q. Is it canvas?

A. No, it isn't canvas, it is more closely woven than bagging.

Q. It is cloth of some kind?

A. You can't call it cloth.

Mr. Jones: It is a kind of burlap?

The Witness: It is not a burlap.

By the Court:

Q. It is a fabric, something in the nature of bagging?

A. But it is thicker than bagging altogether, for bagging [fol. 298] would be no use for separating cargoes.

Q. Can you see through it?

A. Not if you hold it up to this light; if you hold it up to a very fair light, you couldn't see through it.

Q. Air can go through it?

A. Oh, yes, sir.

By Mr. Keating:

Q. What did you do with the separation covers, where did you put them?

A. I put them in the forward part of the wooden bulkhead in the between decks.

Q. Did you nail them on?

A. Yes, I nailed them on flat, right across on the forward part, that was before ever they started loading cargo.

Q. Before you started loading did you go down and look at that bulkhead in the No. 2 between decks?

A. On the forward part in No. 2 between decks, yes, sir.

Q. What have you to say as regards its condition?

A. Well, from my own opinion it was in very good condition, and from the time we took the cargo in Hull—no, it couldn't be that, it was the other voyage.

Q. Well, after you looked at this bulkhead, that is what you went down there to do, was it?

A. Yes, sir.

Q. Did you go over it all, or only a small part of it?

A. I went all over it.

Q. And then you put on the separation covers?

A. Yes, sir.

Q. Then what did you do?

A. I was down there and saw them start loading the cargo.

Q. What cargo did you put in and where did you put it with reference to the bulkhead, the wooden bulkhead in No. 2 between decks?

[fol. 299] A. In the forward part of the bulkhead, in the No. 2 between decks?

Q. Yes.

A. There was what we call zinc dross like ingots of it, like pig iron, that was put on the deck right across the ship.

Q. Where with respect to the wooden bulkhead?

A. Right close up alongside the bulkhead.

Q. All right; then what else did you put in?

A. We put cases of lard, sir.

Q. Anything else?

A. And cases of condiments, Heinz's tins.

Q. And how far up along the bulkhead, starting at the bottom of No. 3 between decks and going up along the wooden bulkhead how high did you pile the cargo?

A. I piled it to within 2 feet, or as near as I can say, 2 feet, from the deck head.

Q. And was that space in No. 2 between decks forward of the next bulkhead substantially full of cargo?

A. What did you say?

Q. (Repeated.) Was that space in No. 2 between decks forward of the next bulkhead substantially full of cargo?

A. Yes, sir.

Q. How many ventilators are there in that compartment, No. 2 between decks?

A. I couldn't say.

Q. I am still talking about the August voyage. Now, had any change been made in the bulkhead at the after end, that is, the steel bulkhead with the wooden wings, had there any change been made in that bulkhead from the previous voyage?

A. No, sir.

Q. Now, what was behind the wooden wings of that bulkhead when you left in August, what did you carry in the between decks? In other words, I want to know what was against the bulkhead on the after end of No. 3 between [fol. 300] decks, which, as I take it, is the steel bulkhead with the wooden wings, what was on the other side of that?

A. That is what I call the bunker space.

Q. That is part of the regular bunkers of the ship?

A. Yes.

Q. Was that full of coal?

A. To my knowledge it was, as far as I know.

Q. I show you, Mr. Ellison, what purports to be a cargo plan of the vessel, which is marked Exhibit 13, and ask you whether you recognize that as one of the cargo plans of the vessel?

A. Yes, that is a cargo plan.

Q. It represents the position of the cargo, as far as you know?

A. As far as I know, sir.

Q. Do you remember when it was you put the hatches on the main deck which leads down in the No. 3—the hatch covers? You had them off when you were loading?

A. Yes.

Q. You had to have them off?

A. Had to have them off.

Q. You put them back at some time?

A. Yes, sir.

Q. When did you put them back, do you recall?

A. Yes, sir.

Q. When was it?

A. When they completed bunkering, I told you that.

Q. When was it you sailed from New York? Look at your logbook and tell me when you sailed from New York.

A. We left New York on Saturday, the 28th of August, 1926, at 10:17 A. M.

Q. That is all right. Now, did you stop anywheres to take anything up?

A. We stopped in Gravesend Bay.

Q. When was that?

A. At 11:15 A. M.

Q. Did you do anything there?

A. Stopped there to pick up 86 cases of powder, gunpowder.

[fol. 301] Q. Gunpowder?

A. Gunpowder or powder, I understood it was gunpowder, for it was put in a specially constructed magazine.

Q. Then did you proceed to sea?

A. After we loaded the powder then we proceeded to sea.

Q. Who was it that first observed the smoke?

A. It was myself that observed the smoke.

Q. Where were you at the time?

A. I was on watch, sir.

Q. Tell us what you saw?

A. I was keeping watch on the bridge. I went on duty at 4 o'clock. It was my watch from 4 to 8.

Q. That is 4 P. M. to 8 P. M.?

A. 4 P. M. to 8 P. M. and 4 A. M. to 8 A. M., morning and afternoon, two watches a day.

Q. This was the afternoon watch?

A. That was the P. M. watch.

Q. What did you see?

A. I was walking backwards and forwards and I observed some smoke coming from the ventilator of No. 3 on the starboard side.

Q. What did you do?

A. I blew down the tube to the master, and he answered me, and I reported the matter to him.

Q. Then did he come up?

A. He came up immediately.

Q. Anybody else?

A. Then I sent down for the second officer to relieve me and then the second officer came to relieve me on the navigating bridge, and the master and myself went along to the ventilator.

Q. What did you do?

A. We got a few of the seamen, and while we were doing this the chief engineer comes along.

Q. You don't know how he came to be there?

A. No, I looked around and he was there.

[fol. 302] Q. All you know, he turned up?

A. I turned around and he was there.

Q. All right; what did you do?

A. Two or three seamen and myself, and whoever was in the vicinity, we unshipped the ventilator.

Q. You mean you took it off the deck?

A. Yes.

Q. All right. What happened next?

A. Then we looked down and——

Q. Was there much smoke coming out?

A. Smoke was coming out.

Q. Much or little?

A. Not much, just a little.

Q. And how did you look down?

A. I got a portable electric lamp, electric bulb, you know, on the end of the cable, and lowered the bulb down through

the ventilator, lowered it down so the light would shine around from the electric bulb, see?

Q. Yes.

A. And there not being so much smoke at first it was likely the electric light penetrated from the ventilator on the boat.

Q. You looked down?

A. We looked down, yes.

Q. What did you see?

A. I saw the smoke coming from the ventilator into the section of the ventilators from the between decks.

Q. How could you tell it was coming from the between decks?

A. From the light, and where it was coming out from the intersection.

Q. You mean you looked into the section that runs into the No. 3 between decks?

A. I looked into the section that runs into the No. 3 between decks.

Q. And you could see the smoke coming into the ventilator at that time?

A. Yes, sir.

Q. Did you lower it in?

A. Yes, sir, down to the grain.

Q. Was any smoke coming off the grain?

A. None at all.

[fol. 303] Q. Was there any doubt it was coming out of the ventilator in the No. 3 between decks?

A. No doubt at all, sir.

Q. What did you do next?

A. What did I do next?

Q. Yes, you.

A. I took a piece of ratline——

Mr. Jones: What is that?

Q. Is it r-a-t-l-i-n-e?

A. It is r-a-t-l-i-n-e.

Q. Is that the right way to spell it?

A. Yes, sir, but we don't talk about line; it is ratline we call it.

Q. All right; you are lowering a piece of ratline?

A. Yes, sir.

Q. What did you do next?

A. The light was down there and I guided it down, this piece of ratline, guided it down in between the intersections of the ventilators.

Q. What do you mean by the intersections between the ventilators?

A. The space where the coal was.

Q. Did you get the ratline down on the coal?

A. I got it right down on top of the coal.

Q. Go ahead; what happened next?

A. I put the ratline down and I left it down there, as near as I can say, approximately five minutes; that is as near as I can say.

Q. All right.

A. I pulled the ratline up and I looked at the end of it and that ratline was sort of black and just smoking slightly, just a little smoke coming from it.

Q. All right, what happened next?

A. Well, the master was there, and we sort of consulted——

Q. You had a consultation of officers?

A. Yes, sir.

[fol. 304] Q. Did you participate in it?

A. Yes, sir, with the master.

Q. And what did the master decide to do?

A. We decided to turn around.

Q. And did you do that?

A. And go back to the river, toward New York way. We turned around and proceeded back towards New York.

Q. Did you do anything to the ventilator after you turned around or before you turned around?

A. We covered that ventilator up.

Q. With what—what did you cover it up with?

A. Put a plug on it, a wooden plug, that fits in the—what do you call it—the cowl.

Q. The cowl?

A. We call it the cowl.

Q. Did you put one on the other end too?

A. Not for the time being.

Q. You eventually arrived back at Gravesend Bay, did you?

A. We eventually arrived back at Gravesend Bay.

Q. And discharged your gunpowder?

A. We discharged our gunpowder.

Q. Now, while you were on the way back did you do anything else?

A. I did, sir.

Q. What did you do?

A. I took off a couple of hatches from the after end on the starboard side of No. 2 weather deck.

Q. All right. What else did you do?

A. Put a small ladder down to reach on to No. 2 shelter deck hatches.

Q. All right; what did you do next?

A. I went down on the No. 2 shelter deck, on the starboard after corner of No. 2 shelter deck hatch; I took 2 or 3, I don't know whether it was 2 or 3, I will say a few hatches off the corner of No. 2 shelter deck hatch, starboard side. The master was with me; he had a torch.

[fol. 305] Q. A torch?

A. An electric torch. And I asked the master, I said, "Lend me that torch", and I crawled over the top of the boxes of cargo as far back as I could to flash the light to see if there was any signs of smoke, any signs of fire.

Q. Did you see any?

A. I saw no signs of fire whatever, and no signs of smoke.

Q. Now, that space that you crawled over was over the cargo that was loaded in what place?

A. Well, I went down, that was in No. 2 between decks.

Q. You were in No. 2 between decks?

A. Yes, I was in No. 2 between decks.

Q. So when you crawled over the cargo you were looking aft?

A. Towards the wooden bulkhead.

Q. And what did you see when you looked towards that bulkhead?

A. I didn't see anything.

By the Court:

Q. No sign of smoke?

A. No sign of smoke.

Q. And no sign of fire?

A. No sign of fire, sir.

Q. Did you feel any heat?

A. I did not feel any heat.

Q. These cargo screens that you mentioned, were they singed or scorched at all?
A. Not at all, sir.

By Mr. Keating:

Q. You crawled out of there eventually?
A. Yes, sir.
Q. Came up on deck?
A. Yes, sir, put the hatches on, of course, when I came up.
Q. And you proceeded back to Gravesend Bay?
[fol. 306] A. We proceeded back to Gravesend Bay, and we anchored in Gravesend Bay.
Q. And took off the gunpowder?
A. We got No. 1 derricks up, and the crew, the sailors and firemen, along with the other officers, also the master, we took the gunpowder out of the specially constructed magazine and placed it on the weather deck.
Q. You finally got it off the ship?
A. We finally got it off the ship.
Q. Were you glad to see it off?
A. Yes.
Q. You parted, without regret, with the gunpowder?
A. Yes, sir.

Mr. Keating: Now, Mr. Jones, I can shorten this business up a good deal if you are not going to make any point as to the efforts that were made to put out the fire and the fact that the fire caused this loss. Your Honor knows that this fire started and got worse and worse and finally reached such a point that they pumped so much water in her that she turned over and became a total loss.

Mr. Jones: I think we have already stipulated that, but I will give you any further stipulation.

Mr. Keating: So, if your Honor is agreeable, I will not go into all these lurid details that finally led to this unfortunate loss.

The Court: Oh, yes.

Q. To go back to this wooden bulkhead separating the No. 2 from No. 3, my associates point out that I asked you the length and breadth of the planks, but I forgot to ask [fol. 307] you the thickness. Will you please tell us the thickness of those planks?

A. The thickness was, let us see, as near as I can judge it was 3 inches. The thickness was 3 inches of the planks.

By the Court:

Q. 8 inches wide?
A. 10 inches wide and 3 inches thick.
Q. Did they vary? Were different ones wider than others?
A. They might vary a little.

By Mr. Keating:

Q. Did the thickness vary at all?
A. Oh, I thought you meant about the width varying. No, the thickness of the planks didn't vary; they were standard thickness.

By the Court:

Q. What were they attached to on the top and the bottom?
A. The planks?
Q. Yes.
A. They were jammed tight in to the deck below and on each side of the plank there was——
Q. No, no, on the under side of the shelter deck what were they attached to?
A. On each side there was a sort of a beading running across each side in a slot.
Q. Is that a permanent thing, that slot?
A. Yes.
Q. Was that metal?
A. No, sir, it was of wood.
Q. And how about the between deck?
A. On the deck itself, what we walk on, it was about the same.
Q. About the same thing?
A. Yes, sir.

The Court: All right.

[fol. 308] By Mr. Keating:

Q. That slot consisted of two pieces of wood, did it?
A. Yes, sir.

Q. Is that part of the sill that these gentlemen were talking about? Some of these photographs show a sill. If I showed you that picture, do you think you could tell us if that is part of the sill?

A. I think I could.

Q. As near as I can make out, these three photographs, Exhibits 1, 3 and 14, show a piece which Mr. Bagger marked in each case with "sill piece". Look at Exhibit 3 and look at the point on the photograph marked D by Mr. Bagger, marked "sill piece"; is that part of the sill, or can you tell us? Tell us just what it is.

Mr. Jones: If he doesn't know, let him say so.

Q. If you don't know, Mr. Ellison, say so. If you do know, tell us what you know.

A. I couldn't say; I couldn't say on that. When were these photographs taken?

Mr. Jones: They were taken after the boat was raised.

The Witness: Well, the ship was under water.

Q. Well, will you look at Exhibit No. 1, and you will notice that somebody has written on the face of this photograph "piece of sill"? Will you tell us whether you can identify that as a piece of the sill, or if you can't, say so?

The Witness: This is an enlarged photograph?

Mr. Jones: No, it was taken that size.

A. I cannot.

[fol. 309] Cross-examination.

By Mr. Jones:

Q. Mr. Ellison, will you tell me the size of this sill?

A. The size?

Q. Or slot. You had two pieces of wood, I don't know whether you had a piece that was long enough to go from one side of the ship to the other, so it was possibly made up of several pieces?

A. Yes, sir, that is right.

Q. Each piece must have had three dimensions. I want those three dimensions.

A. I can't give you them exact.

Q. Give it to the best of your ability.

A. Can I judge by this? (Pointing to a ruler.)

Q. Oh, surely.

A. I should say they was 10 inches.

Q. I will call that wide; that rested on the deck.

A. 10 inches that rested on the deck.

Q. And how high? We will call the next dimension high.

A. This way? (Indicating.)

Q. Yes, that is all right.

A. I should say 6 inches on the outer edge, see; then it sort of comes down a bit.

Q. What do you mean, sort of comes down?

A. Have you a bit of paper?

Q. Do you want to draw it out for me? Here is a pencil and paper.

A. (Witness makes a diagram.)

Q. Shade the portion which consists of wood, Mr. Ellison, so we will know just what it is.

A. (Witness does so.)

Q. Was there any piece of wood on this side?

A. Yes, sir.

Q. Now, is this the top or the bottom?

A. Both top and bottom.

Q. Now, so that I will understand, the shaded portion, [fol. 310] as nearly as you can recall, indicates the wood?

A. Yes, sir.

Q. And as I understand it, the width of the deck at the place I mark A to the place I mark B was 10 inches?

A. That is as near as I can say.

Q. That is as near as you can recall. I am not asking you to perjure yourself, I am only asking you to tell me what you think. And from B to C it is how much?

A. 6 inches, and that sloped down here.

Q. It sloped down from B to C. Could you tell me what that dimension was, from A to B?

A. This is 10 inches, and that is 6 inches.

Q. And from A to D is 9 inches?

A. I think so.

Mr. Jones: The witness has drawn a sketch showing the position of the two pieces of wood which formed the slot, and I have placed around one of the pieces of wood the letters A, B, C, D, and put around the other shaded portion indicating the other piece of wood, A′, B′, C′, D′. The

witness says that the dimensions of the pieces of wood were as follows: From A to B, 10 inches; from B to C, 6 inches; and from A to D, 9 inches.

Q. Now, the dimensions of the other piece of wood, which is marked A′, B′, C′, D′, is the same?

A. Yes.

Q. And that was the situation on the deck both with respect to the top and the bottom of the bulkhead?

A. Yes, sir.

Mr. Jones: I ask that the sketch be marked in evidence.

(Marked Libelant's Exhibit 21 in evidence.)

[fol. 311] Q. How did you fasten the pieces of wood which formed the slot to the deck?

A. To the deck?

Q. Yes.

A. I didn't fasten them at all.

Q. I thought you said this bulkhead was built under your supervision.

A. No, I didn't say it was built under my supervision; I said the slots were there.

Q. The slots were there in the first instance?

A. In the first instance.

Q. So you never examined to see how it was fastened; it was part of the permanent work on the ship?

A. Yes, sir.

Q. How was the deck constructed? Was it constructed of plates of steel?

A. Yes, sir.

Q. And I suppose constructed as the ordinary steel deck is constructed, that is, the plates overlapped and then riveted together at the places where they overlapped?

A. Yes, sir.

Q. Did you observe that these pieces of wood that constituted the sill rested on this deck at the place where the deck overlapped?

A. Did I see that they were there?

Q. Yes.

A. Yes, sir.

(Adjourned until 2:15 P. M., November 8, 1929.)

November 8, 1929—2 o'clock P. M.

Trial Resumed

FREDERICK ELLISON resumed the stand.

Cross-examination.

By Mr. Jones (continued):

Q. Mr. Ellison, just before the lunch recess we were talking about the slot which you were kind enough to illustrate [fol. 312] with me by the drawing which is Exhibit 21.

A. As near as I could possibly do it.

Q. Yes, I understand that. I understood you to tell me that the slot consisted of these two pieces of wood which you have drawn (indicating).

A. Yes, sir.

Q. Indicating the size on this drawing.

A. As near as possible.

Q. As near as possible?

A. Yes.

Q. And these two pieces of wood were laid on the deck?

A. Yes.

Q. Were they locked underneath or not, or anything like that?

A. As I mentioned before, these bulkheads were in the ship when I joined the ship, and put in by a shipwright carpenter. I could not say; but I know, if I was doing it, I would bolt them to the deck.

Q. You would bolt them to the deck, the sills?

A. Certainly I would bolt them to the deck.

Q. How did you put the planks in the slot—slide them in?

A. I could not tell you, sir; as I say, they were in there when I joined the ship.

By the Court:

Q. The planks, the uprights?

A. The uprights were there sir, that is a part of the bulkhead.

By Mr. Jones:

Q. When you joined the ship, the bulkhead was already in place?

A. Yes, it was erected, fixed at that time.

Q. So you don't know how it was put in?

A. No.

[fol. 313] Q. Now, do you know whether or not they were planed?

A. Planed?

Q. Yes; how did you know that?

A. Because I know that by putting on these here bulkhead battens.

Q. All that you know was that you could see that the boards were very close together?

A. Very close together.

Q. You don't know whether they were planed or not, you could not say, but just that they were close together, the edges of the planks were close together?

A. You can tell by the lay of the plank. If you put two unplaned planks together, and two planed planks together, you can tell the difference.

Q. Do you know when this bulkhead was put in the ship?

A. No, sir; as I told you, it was in when I joined the ship in December.

Q. I have got a note here—it must be wrong about this—but my note said that the carpenter constructed the bulkhead under your supervision.

A. No.

Q. I must be wrong.

A. Yes, sir; I meant to say it was the other carpenter put that up, and my carpenter used to nail this here bulkhead battens down if there was any knocked off.

Q. When did you join the ship?

A. In December, 1925.

Q. So that the bulkhead was in the ship at that time?

A. It was in the ship at that time; yes, sir.

Q. That is, in December, 1925?

A. In December, 1925.

Q. Do you know whether or not the planks were nailed to the pieces of wood shown in Exhibit 21?

A. Were nailed to the pieces of wood?

Q. Yes.

A. No; I could not say.

[fol. 314] Q. You don't know?

A. I could not say, sir.

Q. Now, did you nail the battens over the cracks?

A. If there was any battens knocked off, like on the fore part or the after part, I always used to have a stack of these bulkhead battens, and it was my place just to look around, and if there was any knocked off, to see that the carpenter put them on.

Q. The only battens that you nailed on were battens you replaced—those that you found missing?

A. Yes, sir.

By the Court:

Q. Were there any battens on the coal side, the bunker side, of the bulkhead?

A. I said before on the aft side and the fore side, yes, sir.

By Mr. Jones:

Q. Now, these battens are like strips of wood, are they not?

A. They are like strips of wood.

Q. Can you give us an approximate idea of their dimensions?

A. Approximately?

Q. Yes.

A. From 3 to 3½ inches in width, and a quarter of an inch in thickness.

Q. A quarter-inch in thickness?

A. Yes, sir.

Q. I imagine you nailed them on with wire nails?

A. With wire nails; yes, sir.

Q. How close together did you put the nails? Can you give us any estimate?

A. I could not.

Q. 6 inches, or 1 foot, or what?

A. It would be closer than that.

Q. Closer than 6 inches?

A. Yes, closer.

Q. How much closer than 6 inches would these be nailed in?

A. One on this side (indicating), and one on this side (indicating).

[fol. 315] Q. Yes, I understand, you put one on one side of the batten and another on the other side of the batten?

A. Yes.

Q. Now, when you would put those two nails in there, you would not put two nails only in the whole long strip?

A. Oh, no.

Q. What I want to know is, how close together you would put them.

By the Court:

Q. The nails were not opposite to each other on the batten? He said that they were like this (indicating).

Mr. Jones: Staggered?

A. Certainly—zig-zag.

By Mr. Jones:

Q. That is what I wanted to get at. I understand you have your nails staggered?

A. Yes.

Q. Up and down on the batten?

A. Yes.

Q. What I want to know is, how far was it from the—you have two nails, both on the same side of the batten?

A. Two nails, both on the same side of the batten.

Q. What would be the distance between those two nails?

A. On one side would be an inch.

Q. An inch between the two nails?

A. An inch between the two; that is, to the best of my knowledge.

Q. That is to the best of your knowledge now.

A. Yes, sir.

Q. Now, I also understood you to say that you took a light and put it on one side of this bulkhead and looked to [fol. 316] see if you could see the light shining through.

A. Yes, sir.

Q. You did that on what date?

A. I did it before we put the coal in.

Q. You didn't do it after that?

A. Could not do it.

Q. Because the coal was there?

A. Because the coal was on the other side I could not do it, I could not.

Q. You were not given any instructions by anybody as to how these bulkheads were to be constructed, because you had nothing to do with the construction of them?

A. No; it was in the ship at the time.

Q. Them, except that you saw those bulkheads there?

A. I saw them there, those bulkheads there, and it was my job to see it was as it should be.

Q. You told us about some cargo separators, as you described them.

A. Yes, sir.

Q. Is that it?

A. Separation covers.

Q. Separation covers?

A. Yes, sir.

Q. You don't know exactly what the material was; you described it as bagging?

A. No, I didn't say it was bagging; I said it was thicker than bagging, more closely woven.

Q. Do you know whether it was cotton, or jute, or what material it was made of?

A. I could not specify the stuff.

Q. You don't know?

A. If I would see it, I could tell you.

Q. But you could not now tell us what it was made of?

A. No, I could not tell you, sir.

Q. Then you said you took these pieces, which, as I understood you, were about the size of a tarpaulin?

A. About the size.

[fol. 317] Q. That you would put over a hatch?

A. Yes, sir.

Q. And that thing was—you would not think one piece would be sufficiently large to go from one side of the ship to the other?

A. No, sir, it was not, no.

Q. It also would be true that the width of the piece would be greater than the height of the compartment; isn't that so?

A. The width of the piece?

Q. Yes.

A. Yes, it would.

Q. How did you fasten that piece of material which you have described to us, to the bulkhead, with nails?

A. It took three of us.

Q. Three of you working?

A. Three of us working.

Q. I am not interested so much in the man power as I am interested in the method that you three used in fastening the material to the bulkhead. I wish you would tell us just how you did that.

A. This bulkhead batten I was telling you about, I would put the cloth on at the top——

Q. You nailed it there?

A. And put the bulkhead batten over the cover—the cover is in between that bulkhead batten and the bulkhead, the cover is; this here bulkhead batten is outside the cover, and as it is to be made fast, we nailed it on to keep it fastened on.

Q. Around the top?

A. From the top.

Q. Then as I understood you, you put this batten both on the No. 3 side over any cracks, and then you took this piece of material that you have, that you call a cargo separation cover——

A. Yes, sir.

Q. —and put it on the bulkhead?

A. Yes, sir.

Q. And then you took a batten and put around, along the edge?

A. Not around the edge.

[fol. 318] Q. Where did you put it?

A. I said around the top.

Q. Around the top?

A. So it would not fall down.

Q. You didn't put anything around the bottom?

A. Not on the bottom.

Q. Nor did you put anything on the sides?

A. Not on the sides.

Q. So that the only fastening that you put on the separation cover, was a batten at the top of the bulkhead?

A. I put more than that, sir.

Q. What else did you put? That is what I want to get.

A. You got one here of these covers; one would not go across.

Q. Yes.

A. And we put another one; it would take at least two; and where those covers overlapped, so to keep them closed

together, I put a batten down, see, from the top to the bottom.

Q. Now, then, so I can get it quite clear and quite correct, and if I am wrong about it in any way I shall thank you to fill it in.

A. Fill in what, sir?

Q. Tell me something else you did, if I don't mention everything you did in respect to putting up that cover.

A. I see.

Q. You took the cover.

A. Yes, sir.

Q. You required two or more to go from one side of the ship to the other?

A. Yes, two or more covers; yes.

Q. And then you fastened that by battens at the top?

A. Yes; at the top.

Q. This batten you nailed to the planks?

A. Yes, sir.

Q. That is, to the planks that made up the bulkhead?

A. That is right, sir.

Q. Then where the covers overlapped, you took a batten [fol. 319] and fastened that down at the place where they overlapped?

A. Yes, sir; that is right.

Q. Were there any other fastenings that you used to hold these separation covers in place?

A. There was no other place, no, because as long as it was flat alongside of the bulkhead.

Q. That is all that you did?

A. Yes.

Q. I show you a picture which has been marked Exhibit 8, and I direct your attention to a plank which appears on the right hand side of the picture, and ask you whether or not that plank was the type of plank which was used in the construction of this bulkhead?

A. I could not say.

Q. You don't know?

A. I don't know, sir; I could not say.

Q. Do you know whether or not the wood used was oak, pine, or what it was?

A. I could not specify the wood.

Q. You don't know?

A. I could not specify the wood; I would, if I was a carpenter.

Q. Now, as I understood you in your testimony to Mr. Keating, the two ventilators which are shown on Exhibit 11, are the only two ventilators in your No. 3 compartment?

A. Yes, sir.

Q. Then I am correct in stating, am I not, that you had nothing to do with the placing of this bulkhead or the method of its construction or anything about it which was already in the ship, when you joined the ship?

A. Exactly, sir, exactly.

Q. Now, you have stated that there was about 150 tons of old coal in the ship when you got here in August, 1926. The master, in a letter which has been put in evidence, states that there was about 160 tons. You would not say there was not as much as 160 tons?

A. Ten ton difference?

[fol. 320] Q. Yes.

A. In a place like that, you could not judge to ten tons.

Q. You would not say that the master is wrong on that?

A. No; you cannot judge to ten tons in a place like that.

Q. I show you Exhibit No. 13, and direct your attention to what apparently is a door in the wooden bulkhead, in the aft part of the compartment; and I ask you whether or not you remember such a door being in that bulkhead.

A. Do I remember that door?

Q. Yes.

A. I do remember it.

Q. Where did that door lead to?

A. That door led—you are talking about the 'tweendecks now?

Q. Yes.

A. That door led into the bunkers.

Q. Into the bunkers?

A. Into the bunkers.

Q. Was that used as a passageway?

A. If necessary it was, yes, sir. I thought you were going to ask me something else as well.

Q. Was there any coal piled against that door, or was the door kept so that you could open it so you could pass through?

A. That door was made so that when they—this is the bunkers, isn't it?

Q. Yes.

A. That when the permanent bunkers is out—after the permanent bunkers were out, we used—it was so that that door could be taken down and we could have access to that coal in that cargo space—we had the coal in the cargo space, you understand that?

Q. Yes. What I want to get at is this: I show you Exhibit 11, and I direct your attention to the wood bulkhead at the point "B" as shown on the exhibit.

A. Yes.

Q. Then that runs from the hatch coaming over to the side of the ship, that wood bulkhead?

A. Yes.

[fol. 321] Q. There is a similar wood bulkhead on the other side of the ship running from the hatch coaming to the other side of the ship?

A. Yes.

Q. One on the port side and one on the starboard side?

A. That is right, sir.

Q. That bulkhead, apparently, according to the photograph, was constructed of pieces of wood which ran parallel to the deck.

A. Yes, sir.

Q. That is correct, isn't it?

A. Yes.

Q. And I direct your attention to the word "Passage" that appears on this drawing, Exhibit 11.

A. That is right.

Q. And I ask you whether or not that those passages were in that position, if you remember it.

A. Were they in that position?

Q. In the position as shown on this drawing? Is that your recollection as to that?

A. That is my recollection.

Q. That is the way they were?

A. In my recollection.

Q. Was this door in place when you left New York on August 28th, 1926?

A. That door was in place, sir.

Q. That door was shut?

A. The door was shut.

Q. Did you have coal piled on the other side of the door here?

A. Clear up here (indicating).

Q. Here is what I mean to say: Did you have coal piled on the forward side of the door as well as the after side?

A. On both sides.

Q. On both sides of the door?

A. Yes; on both sides.

Q. Now, what kind of a door was that?

A. What kind of a door?

Q. A wooden door?

A. Wooden door.

Q. On hinges?

A. No, sir.

[fol. 322] Q. How did it work, or how was it—what sort of a door was it? That is what I want you to tell me. You say it is not on hinges.

A. I mean—this is over three years ago already now.

Q. I want you to give me your best recollection, that is all.

A. I am telling you now, this is such a long time ago.

Q. Well, now, do you remember what kind of a door you had there?

A. I have a faint recollection.

Q. Give us your best recollection.

A. I will give you my best recollection.

Q. Your best recollection of the type of door that you had in that place.

A. It was a wooden door of the same sort of wood as the bulkhead.

Q. That is, a roughly constructed door of the same rough construction as appears on the photograph which I showed you before, made of planks as appears on the picture at the point "B"?

A. The planks where the man has his hand.

Q. And the door that formed—which you put in to close up the passageway, was made of the same type of plank?

A. Exactly.

Q. As shown on this picture?

A. As those planks there that that man has got his hand on.

Mr. Keating: What exhibit is that?

Mr. Jones: That is Exhibit 4. And this other one which I called "13", I made a mistake; it should be "3".

The Court: Steel bulkheading, that is what this is (indicating)?

Mr. Keating: That is correct.

Mr. Jones: Behind the feeder?

Mr. Keating: Yes.

[fol. 323] Q. I show you Exhibit 3, which shows the door also, and the planks; there is the door (pointing)?

A. Where?

Q. Right there (indicating).

A. The space for the door? That is not a door.

Q. That is not a door, the door itself?

A. It is a space.

Q. I understand. The door which you used to close that space, was made of the same type of planks as shown on this exhibit at the point "B"?

A. This here (indicating)?

Q. Yes.

A. The same as the bulkhead.

Q. And around the edge of the door the same as the bulkhead?

Mr. Keating: The frameway of the door.

A. Now, the frameway of the door, and the door, were the same kind as the bulkhead.

Q. Those planks, as I understand you, were used to make that door, these were planks which ran parallel to the deck just as your bulkhead ran parallel to the deck?

A. Yes, sir.

Q. How are those planks fastened together to make it solid as a door?

A. I could not say.

Q. You could not remember?

A. I could not say, sir.

Q. How was the door kept in place? You say it was not on hinges, but it would not stand up there by itself, it would have to be held in some way.

A. I have not the faintest recollection of that.

Q. Have you any recollection at all as to how it was held in place?

A. No.

Q. By bars or bolts or what, do you know how it was held [fol. 324] in place?

A. I could not really remember, sir.

Q. You don't remember?

A. No, I could not remember.

Q. Were you ever given any instructions by anybody with respect to the bulkhead in the aft part of the compartment, that is, the bulkhead which has these two doorways in it that we have been talking about? Did anybody give you any instructions with respect to that bulkhead?

A. What sort of instructions?

Q. Any instructions of any kind. If so, tell us what they were.

A. No, I have never had any instructions from anybody.

Q. Not from anybody?

A. No.

Q. Of any kind?

A. Of any kind.

Q. Either with respect to that bulkhead or the bulkhead for the forward part of the compartment?

A. As I told you, it was my place to see only about the bulkhead battens, to see they were up properly.

Q. Did anybody give you any instructions about their being made dust-proof?

A. No; it was my place as chief officer of the ship, to see that they were dust-proof.

Q. That is all you know?

A. That is all I know.

Q. Nobody gave any instructions, and you got instructions from nobody, with respect to that bulkhead?

A. No.

Q. You were the responsible officer of the ship for the condition of the bulkheads?

A. I was responsible for the condition and the way the cargo was turned out in Hull.

Q. I believe you said you knew nothing about coal, its properties, or how it should be stowed.

A. No, I don't know anything about it.

[fol. 325] By the Court:

Q. This wooden bulkhead, the forward bulkhead, No. 3, how was that arranged with reference to the frames of the ship, when you get over to the side of the ship, did it go between the frames, the two frames?

A. I don't remember that, sir.

Q. Or did it go to the edge, between the frames?

A. I don't know, really, about that, sir.

Q. Apparently, from this photograph, it would be impossible for that wooden bulkhead that had the bulkhead battens on it, and the cargo separator, it would be impossible for it to go over along to the skin of the ship.

A. What would be impossible—for the bulkhead to go?

Q. Yes.

A. Oh, no.

Q. On account of the horizontal beams?

A. They are not beams.

Q. What are they?

A. They are wooden cargo battens.

Q. What?

A. Wooden cargo battens; that is not iron at all; that is wood, what we call cargo supporters, that is to keep any bales or anything like that, when we stow any bales, any cargo in the holds, that is to keep them from the side of the ship in case of sweating, you know, that is what the cargo battens are for.

Q. You don't remember whether the bulkhead went through these cargo battens?

A. Yes, I remember that.

Q. They did go through it?

A. Oh, yes, they went through to the skin of the ship. That is, I say, I could not say how they were fixed.

Q. They went through, these cargo battens?

A. They went through over here to the skin of the ship, to the shell plating, as we call that.

[fol. 326] By Mr. Jones:

Q. Now, you have produced the log-books and I assume that those log-books are in your handwriting as chief officer?

A. That is right, sir, you will see it is the same handwriting right through.

Mr. Jones: I offer in evidence Exhibit A for Identification of the respondent.

(Same received in evidence as Exhibit A.)

Q. And may I see the other log-book, please?

A. (Producing.)

Mr. Jones: And I offer in evidence the log-book which has been marked Exhibit B for Identification.

(Same received in evidence as Exhibit B.)

Q. Now, I show you Exhibit No. 1, and call your attention to what apparently is—I shall call it a step on the ship's side as appears in this picture.

A. Yes.

Q. And I ask you how the bulkhead was fastened at that place, if you know.

A. I could not say, sir.

Q. Well, it is quite obvious——

A. And as I say, I could not explain it to you; I am not a carpenter. These bulkheads were all complete in the ship, when I joined her, and I am not a proper shipwright carpenter, you understand that to know.

Q. You have no recollection at all how that was?

A. No, sir, I have not, I have no recollection at all, but there is a piece of sill.

[fol. 327] Q. Do you remember that there was a piece of sill, two pieces of sill, here, that went from one side of the ship to the other?

A. Yes.

Q. And so far as you could see, the planks were in between those two pieces of sill, which acted, as you described, as a slot?

A. Yes, sir.

Q. And that was at the top as well as the bottom of the bulkhead?

A. Yes.

Q. With ordinary plank, running up and down?

A. Up and down.

Q. You don't remember whether the planks were made of oak or pine or what the kind of wood it was?

A. I don't know what sort of wood it was.

Q. All that you can tell me is that it was wood?

A. Wood.

Q. Did you observe anything on the ship's skin which was used to hold the bulkhead in place?

A. On the shelf plating, you mean?

Q. On the shelf plating.

A. There was some erections there, but I could not explain how they were.

Q. Were they wood?

A. They were wood, yes; but I could not explain how they were fixed on, or what.

Q. But you do remember they were wood?

A. I remember they were wood, all right; I say that, I saw them.

Q. Was there a slot there?

A. It was a sort of a slot affair, fixed up on the side.

Q. I believe you told me that the wooden bulkhead was in the ship, when you joined the ship, in December, 1925?

A. That is right, sir.

Q. And you also said, I think, in answer to questions by Mr. Keating, that you carried no coal in that No. 3 space [fol. 328] before what we described to you as the June voyage of 1926. Am I right about that?

A. That is quite right.

Q. What did you use that space for before June, 1926, which was there from December, you know, until June—what did you use that space for before this?

A. We used it for general cargo.

Q. General cargo?

A. Case goods, light goods.

Q. You carried cargo in that space before?

A. Yes, sir.

Q. So the space was not constructed for the purpose of using it as a bunker, was it?

A. As a bunker?

Q. I say, it was not constructed to be used as bunkers, because you never used it as bunkers, it never had been used as a bunker so far as you know, before June, 1926?

A. I don't know whether it had been used for bunkers or not; not while I had been in the ship.

Q. So far as you know, it never had been used?

A. So far as I saw.

Q. But it was used as a cargo compartment?

A. For cargo.

Q. Now let us come back to this after bulkhead again. You said that was made of pieces of wood which were parallel to the deck?

A. Yes, sir.

Q. Can you give me any idea of the approximate sizes of those pieces of wood?

A. The approximate sizes of the pieces of wood forming the bulkhead?

Q. How wide were the pieces of wood?

A. The same as I said on the forward ship's bulkhead.

Q. The same sort of bulkhead?

A. The same bulkhead construction.

Q. The difference being that the pieces of wood were laid parallel instead of vertical?

A. Instead of vertical, yes, sir.

[fol. 329] Q. By "parallel", I mean parallel with the deck of the ship.

A. Yes, sir, I understand you.

Q. Were any battens used on that bulkhead?

A. Yes, sir.

Q. And did you use any cargo separators, separation cloths, on that bulkhead?

A. Not when the coal was not there.

Q. So you had nothing on that bulkhead at all?

A. Only the battens.

Q. Only the battens?

A. The battens were left there.

Q. Now, about these battens which you say you had along the top of the cargo separation covers to hold the covers in place, what was the dimensions of those battens?

A. I said they were bulkhead battens, sir.

Q. Now, can you tell me, they were pieces of wood, I suppose?

A. I said, I indicated them to be the same as the bulkhead battens. I explained to you before the size and I explained to you what the bulkhead battens are, and the size.

Q. Then, as I say——

A. (Continuing:) It was one of those bulkhead battens, as I explained to you before.

Q. You put them on there?

A. That is right, sir.

Q. Parallel to the deck, the same sized battens as you described before?

A. Yes, and as fastened with ordinary nails.

Q. In the top of the bulkhead?

A. That is right, sir.

Q. And elsewhere in the bulkhead?

A. Yes.

Q. Did you nail those battens over the other battens which were supposed to close the cracks?

A. Yes.

Q. So they would stand up?

A. They would stand up.

[fol. 330] Q. That is, stand out on the sides of the bulkhead?

A. It would stand out, sir.

Q. And you nailed your strips with nails, and the nails went through the battens into the bulkhead and into the battens that was there? How would you fasten the battens to the bulkhead—with nails?

A. How would I fasten the battens to the bulkhead?

Q. How would you fasten the battens to the bulkhead?

A. That was the idea, they had to be fastened by nails.

Q. On top of the battens?

A. Yes, nails would nail through to the wooden bulkhead.

Q. Your cargo separation covers which you have spoken of, were they on the cargo side of the bulkhead, or on the other side?

A. It was on the cargo side of the bulkhead on the fore part.

Q. These cargo separation covers, my friend here seems to be a little in a mist about it, apparently, although I am not, I think I remember it myself clearly, just what you said, but for his benefit I will ask you the question: The cargo separation cover as I understand you to say, was about the same size as a tarpaulin which you used to put over a hatch?

A. That is right, they were common sized tarpaulins.

Q. Common sized tarpaulin?

A. Yes.

Q. And you would require two or more of those covers to run from one side of the ship to the other?

A. I would require at least two.

Q. At least two?

A. Yes, sir, I would.

Q. You did not cut those covers in any way, did you?

A. No, sir.

Q. You fastened them in the way you have described?

A. Yes.

Q. With a batten across the top and a batten where the [fol. 331] two came together?

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 20

EAGLE & STODDART, INC., ET AL., OWNERS OF CARGO ON STEAMSHIP "GALILEO", PETITIONERS,

vs.

ELLERMAN'S WILSON LINE, LTD., OWNER OF STEAMSHIP "GALILEO"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 19, 1935

CERTIORARI GRANTED APRIL 15, 1935

(36,623)

(36,623)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 20

EARLE & STODDART, INC., ET AL., OWNERS OF CARGO ON STEAMSHIP "GALILEO", PETITIONERS,

vs.

ELLERMAN'S WILSON LINE, LTD., OWNER OF STEAMSHIP "GALILEO"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

VOL. II.

INDEX

	Original	Print
Testimony of Charles Barron	331	255
John Oxtoby	374	292
Gus Magarelli	416	328
John H. Neale	422	334
Harry J. Hicks	447	355
John H. Neale (recalled)	457	364
John S. Heck	459	366
Harry A. Huff	488	388
Robert H. Laverie	504	402
Robert S. Haight	516	412
Charles E. Ross	519	414
C. L. Burke	520	415
Fletcher H. Starr	539	429
William P. Brakenbury	566	451

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1932

	Original	Print
Testimony of Frederick Ellison (recalled)	601	480
William P. Brakenbury (recalled)	602	481
S. W. Parr (recalled)	603	482
Horace C. Porter (recalled)	627	500
Alfred E. Jordan	635	506
John L. Stanley (recalled)	647	515
Fletcher Starr (recalled)	649	517
Libellants' exhibits:		
1—Photoprint of lower deck of "Galileo" between the No. 2 and No. 3 hatches looking forward, marked in evidence at folio 281	659	525
2—Photoprint, same as Exhibit 1 except that the view is toward the starboard side, marked in evidence at folio 285	660	526
3—Photoprint, same as Exhibit 1 except that the view is looking aft on the port side forward, marked in evidence at folio 287	661	527
4—Photoprint, same as Exhibit 1 but showing the compartment containing the sill piece, marked in evidence at folio 289	662	528
5—Photoprint, same as Exhibit 1 but showing the compartment with the caked coal and grease, marked in evidence at folio 290	663	529
6—Photoprint, looking down into the vessel thru the No. 2 hatch, marked in evidence at folio 292	664	530
7—Photoprint, view of the upper between deck compartment between No. 2 and No. 3 hatches, looking aft, marked in evidence at folio 293	665	531
8—Photoprint of the caked coal and grease in the No. 3 lower between deck, marked in evidence at folio 295	666	532
9—Photoprint, showing first, view of bridge looking forward, marked in evidence at folio 296	667	533
9a—Photoprint, view of No. 2 hatchway, taken from the bridge, marked in evidence at folio 296	668	534
9b—Photoprint, view of the fore deck, taken from forward of No. 1 hatch, marked in evidence at folio 296	669	535
9c—Photoprint, view of the after deck taken from the stern, marked in evidence at folio 296	670	536
9d—Photoprint, view of the engine and boiler room casings on vessel, marked in evidence at folio 296	671	537

Libellants' exhibits:	Original	Print
9e—Photoprint, view of the after deck looking aft, marked in evidence at folio 296	672	538
9f—Photoprint, view of one of the holds looking down into the hatchway, marked in evidence at folio 296	673	539
10—Photoprint of a sketch of the arrangement of the between decks of the steamship "Galileo", marked in evidence at 301	674	540
11—Photoprint, sketch, marked in evidence at folio 305	675	541
12—Photoprint, sketch of the deck plan of the lower between decks and shows the locations of the No. 2 hatch, No. 3 hatch, the grain feeder, wooden bulkhead, the ventilators and the passageways, marked in evidence at folios 306 and 321	676	542
13—Photoprint, sketch showing where the coal and cargo was, marked in evidence at folio 323	677	543
14—Letter, dated August 20th, 1927, and photoprints, three sheets, report, marked for identification at folio 360.	678	544
15—Radio messages, marked in evidence at folio 369	683	547
16—Report made by the chief engineer surveyor for Lloyds' Register of British and Foreign Shipping, on Spontaneous Combustion of Coal, dated London, May, 1912, only pages 16 and 17 of pamphlet printed, remainder omitted pursuant to stipulation, marked in evidence at folio 374	684	548
17—Official instruction issued by British Board of Trade, dated December, 1922, only pages 1, 2, and 3 up to paragraph 6 are printed, remainder omitted pursuant to stipulation, marked in evidence at folio 375	689	551
18—Photoprint of plan of the steamship "Galileo", marked in evidence at folio 412	693	554
19—Pamphlet, called "Fires in Steamship Bunkers and Cargo Coal", issued 1923, omitted pursuant to stipulation, marked in evidence at folio 597	694	
20—Stipulation of facts, marked in evidence at folio 827	694	555

	Original	Print
Libellants' exhibits:		
21—Photoprint, sketch showing the position of the two pieces of wood which formed the slot, marked in evidence at folio 930	697	557
22—Photoprint, bill of lading covering the shipment of 8 pieces of plates, signed by W. J. Chatfield, marked in evidence at folio 1299	698	558
23—Photoprint of invoice of the United States Steel Products Company, covering 8 pieces of steel, marked in evidence at folio 1300	699	559
24—Photoprint, stowage plan, marked in evidence at folio 1358	700	560
25—Photoprint, sketch, marked in evidence at folio 1434	701	561
26—Lloyd's Calendar, 1926, Fires in Bunkers and Coal Cargoes, Risks of Spontaneous Combustion, pages 267-269, remainder omitted pursuant to stipulation, marked in evidence at folio 1448	702	562
27—Photoprint of sketch, marked in evidence at folio 1534	707	566
28—Pamphlet by O. P. Hood on Factors in Spontaneous Combustion of Coal, 1922, omitted pursuant to stipulation, marked for identification at folio 1602 and marked in evidence at folio 1613	708	567
29—Printed herein at page 724 as Respondent's Exhibit 29	708	567
30—Photoprint, sketch, marked in evidence at folio 1920	709	568
Respondent's exhibits:		
A—Photoprints of mate's log book of "Galileo" covering period May 15, 1926, to August 22, 1926; page containing August 19 to August 22 photoprinted, remainder omitted pursuant to stipulation, marked in evidence at folios 878 and 976	710	569
B—Photoprints, log book, marked in evidence at folios 889 and 977	711	570
C—Photoprint, cablegram, dated June 23, 1926, marked in evidence at folio 1004.	712	571
D—Photoprint, cablegram, dated August 20, 1926, marked in evidence at folio 1018.	713	572
E—Photoprint, memorandum bearing Oxtoby's handwriting, marked in evidence at folio 1143	714	573

	Original	Print
Respondent's exhibits:		
F—Photoprint of report, marked in evidence at folio 1159	715	574
G—Photoprint, copy of letter delivered November, 1925, marked in evidence at folio 1184	716	575
H—Affidavit of Oxtoby re Magarelli story, omitted pursuant to stipulation, marked for identification at folio 1241	717	576
I—Photoprint, copy of voyage for June voyage, marked in evidence at folio 1284	718	576
J—Manifest of "Galileo" cargo for June, 1926, voyage, omitted pursuant to stipulation, marked in evidence at folio 1286	719	577
K—Photoprint of copy of agent's report for voyage 107, marked in evidence at folio 1289	720	577
L—Manifest for August voyage, omitted pursuant to stipulation, marked in evidence at folio 1291	721	578
M—Photoprint of certificate, marked in evidence at folio 1485	722	578
18b—Photoprint, original plan, marked in evidence at folio 1703	723	579
29—Photoprint, marked in evidence at folio 1808	724	580
Stipulation as to notice of claim	725	581
Memorandum by Coleman, J	726	582
Decree	741	591
Notice of appeal	747	596
Assignment of errors	748	597
Stipulation as to exhibits	780	619
Stipulation as to record	783	621
Clerk's certificate (omitted in printing)	784	
Supplemental transcript of record	785	621
Testimony of John J. Chapman	785	622
Respondent's Exhibit "A"—Memorandum as to coal	807	640
Respondent's Exhibit "B"—Plan of S. S. Marengo	808	640
Stipulation as to supplemental record	810	641
Proceedings in United States circuit court of appeals, second circuit	811	641
Opinion, Swan, J	811	641
Decree	819	647
Clerk's certificate (omitted in printing)	820	
Order allowing certiorari	821	648

A. Where they came down.

Q. And that is the only fastening that you used to make your covers tight to the bulkhead?

A. Just held it onto the bulkhead; that is all.

Redirect examination.

By Mr. Keating:

Q. Mr. Ellison, what became of the scrap logs on this voyage?

A. The scrap logs?

Q. Yes.

A. When the ship was run on the shore, I said to the third mate——

Q. Never mind telling me what happened; I am asking you what was done with it. Was it lost?

A. It was lost.

Q. It was lost?

A. Went down, and it was lost.

Q. These were the only logs *what* you saved?

A. This is all I saved.

Q. Did you save the ship's articles?

A. I did.

Q. Did you lose any of your clothes?

A. Yes, I did lose my clothes.

Q. Mr. Ellison, while you were on board this ship, did you ever wash down No. 3 'tweendecks with a hose?

A. No, sir; oh, no, sir, never did that.

CHARLES BARRON, a witness called on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Are you a master mariner?

A. Yes, sir.

Q. How long have you held a master's license?

A. Since 1895.

Q. How old are you, captain?

A. 58.

[fol. 332] Q. How many years have you been going to sea?

A. 44 years.

Q. Did you start at the bottom and work yourself up to captain?

A. Yes, sir.

Q. Where was your home, when you started?

A. Hull.

Q. Have you been with the same company all these years?

A. Sailing on sailing ships, and then when they were owned by Bailee & Leetham, and then later by the Wilson line, and then finally with the Ellerman's Wilson line.

Q. So you have been with the same interests how many years—same steamship company or its predecessor in interest, approximately.

A. About 39 years.

By the Court:

Q. Are you still with them?

A. Still with them, sir.

Q. What are you doing now?

A. I am here, sir.

Q. I mean, are you captain of a boat now?

A. Yes, sir, I was until I came here.

Mr. Keating: We had to take him off a ship to bring him here.

By Mr. Keating:

Q. Is your master's license a British Board of Trade license?

A. Yes, sir.

Q. For what—unlimited?

A. Unlimited.

Q. Unlimited?

A. Unlimited, all seas.

Q. How many years have you actually served as a master as distinguished from having had a master's license? How many years?

A. 29 years.

[fol. 333] Q. You have been a shipmaster actually in command 26 years?

A. 29 years, that is up to now; 26 years up to the time of the "Galileo".

Q. About how many steamers have you been captain of?

A. I would say approximately about twenty.

Q. And how did they vary in tonnage?

A. From 1000 tons up to 6000 tons.

Q. Were you master of the "Galileo" in August, 1926?

A. Yes, sir.

Q. How long had you been master of the "Galileo"?

A. From October, 1925.

Q. You joined her in October, 1925?

A. Yes, sir.

Q. As master?

A. As master.

Q. Had you served any other steamers of the same line running between Hull and New York?

A. No.

Q. This was your first?

A. First voyage to America.

Q. First voyage in that trade?

A. In that trade.

Q. Was there a coal strike in England in the Spring and Summer of 1926?

A. Yes, sir.

Q. Now, prior to June 21, where had you taken your coal for the round trip prior to June?

A. 1921?

Q. 1926, prior to June, 1926.

A. In Newcastle, and once in Rotterdam, in Holland.

Q. About what is the capacity of the ship's bunkers, if you remember, the permanent bunkers?

A. About 740 tons; I could not say exactly.

Q. When you were coaling on the other side for that round trip prior to June, before the coal strike, did you fill up your permanent bunkers?

A. Yes.

[fol. 334] Q. In Hull?

A. In Newcastle.

Q. And did you carry any extra coal, any surplus coal?

A. Yes.

Q. Where did you carry that?

A. In No. 3 lower hold.

Q. And when you got to New York, was there always something done regularly about the coal that was carried in No. 3 lower hold?

A. Yes; we discharged the coal from the lower hold and put it in the permanent bunkers.

Q. And used that up?

A. And used it up.

Q. And that process went on up until June, 1926?

A. Until the strike.

Q. Until the strike?

A. Yes.

Q. You arrived here, I think it appears from the chief officer's testimony, on or about June 21st, 1926?

A. Yes, sir.

Q. Did you bring over any coal for the round from England on that voyage, in No. 3 hold, or was the coal strike on?

A. No, the coal strike was on.

Q. So you had no coal in No. 3 at that time?

A. No.

Q. In No. 3 lower hold?

A. In No. 3 lower hold, no.

Q. Now, when you were here, did you receive any orders? I don't want you to tell me what the orders were; but did you receive any orders with respect to bunkering in New York for the round voyage?

A. Yes, sir.

Q. From whom did you receive the orders?

A. From Mr. Sanderson.

Q. Who was Mr. Sanderson?

A. The agent for the Wilson Line.

Q. He was connected with the New York agents of your owners—is that correct?

A. Wilson, of Hull.

[fol. 335] Q. Where is Mr. Sanderson—do you know?

A. He has died since.

Q. He is dead?

A. Yes.

Q. Will you tell me what your orders were with respect to coaling, in June, 1926—what orders did you receive?

A. Take sufficient coal for the round voyage, that means from New York to New York, via Hull to New York again.

Q. I show you a cable, captain, dated June 23, 1926, and I ask you if you ever saw that cable before. If you did not see it, say so; if you did, tell me whether you saw it or not.

A. No.

Q. You never saw that cable?

A. Never saw it.

Q. Now, when you got the order to coal for the round, what did you do with respect to it?

Mr. Jones: May I see that cable? (Examining same.)

Mr. Keating: I offer this cable in evidence, with Mr. Jones' permission.

(Same received in evidence and marked Respondent's Exhibit C.)

Q. Now, after you received the order to bunker for the round voyage, did you take the matter up with the chief engineer?

A. Certainly.

Q. And what did you and the chief engineer do, together, if anything, about—first off, of all, did you discuss the amount that it would be necessary to take?

A. Yes, sir.

Q. And do you remember how much you decided would be necessary?

A. No.

Q. The chief engineer and you did decide on some amount; is that correct?

A. We conferred together as to what amount we should take.

Q. After you had conferred, did you go and make any [fol. 336] examination of the ship to determine where you would put the coal?

A. Well, we arranged to put it in the—fill the permanent bunkers up and No. 3 'tweendecks and No. 3 shelter decks.

Q. You decided to put the coal in those spaces?

A. Yes.

Q. Who decided that?

Mr. Jones: I object, if your Honor please, as to who decided it; it is a conclusion.

Mr. Keating: This is the man in charge of the job.

Q. Was it your decision?

A. I decided; it was my decision; we both agreed.

Q. You decided it?

A. I decided it; I made the final decision; there was no dispute about it.

The Court: Just so that Mr. Jones may be protected, I overrule the objection and give an exception to him.

Q. You heard the chief officer testified with regard to the space of No. 3 'tweendecks and No. 3 shelter deck?

A. Yes, sir.

Q. Was his testimony accurate?

A. As near as I can say.

Q. I show you these sketches, and just ask you to look at Exhibits 10, 11 and 12, and ask you whether, approximately, those sketches are correct as far as you can recollect (handing same to witness).

A. On sketch No. 10——

Q. That is Exhibit No. 10?

A. Exhibit No. 10, the wooden bulkhead which separates the shelter deck from No. 2 shelter deck, I think is a little [fol. 337] bit too far forward, according to my recollection.

Q. Other than that, are the sketches all right?

A. Other than that they are; yes.

Q. Before you decided to load this surplus coal into No. 3 shelter deck and No. 3 'tweendecks, did you actually go down into those spaces in June, yourself, with the chief engineer, and do you recollect whether you went down?

A. I don't recollect.

Q. You don't recollect?

A. I don't recollect.

Q. Had you, while you were master of the ship, ever carried any coal—prior to June—in No. 3 'tweendecks?

A. No.

Q. In June, latter part of June, 1926, it has been testified that No. 3 'tweendecks and No. 3 shelter decks were filled up with coal; is that correct?

A. That is in June?

Q. June.

A. Yes, sir.

Q. And was that the first time that any coal had ever been carried in the 'tweendecks, so far as you know?

A. As far as I know.

Q. While you were master?

A. While I was master.

Q. You sailed from New York, I believe it has been testified, on July 2nd?

A. July 2nd.

Q. In July, I think it was on July the 2nd, or thereabouts, for Hull?

A. Yes, sir.

Q. And that you arrived in Hull, in June, the 19th, approximately.

A. Approximately July 19th.

Q. July 19th?

A. Yes, sir.

Q. That you carried grain in No. 3 lower hold on that June voyage; is that right?

A. Yes, sir.

Q. And was that grain discharged in Hull?

A. Yes, sir.

[fol. 338] Q. In order to get that grain, what had you done to the coal in No. 3 'tweendecks and shelter decks?

A. Took that down and shifted it into the permanent bunkers.

Q. That is, you had taken some of it out?

A. Taken some of it out; approximately 200 tons.

Q. Out of the 'tweendecks?

A. Out of the 'tweendecks and the shelter deck.

Q. And that was shifted into your permanent bunkers?

A. It was shifted into the permanent bunkers.

Q. When you were in Hull, in June, do you know what was intended to do with your ship when you came back?

A. I heard the ship was, on the next voyage, would be laying up to get refrigerated—to get her refrigeration fixed up.

Q. To get her refrigeration fixed up?

A. To get her refrigeration fixed up.

Mr. Jones: You said in June; you meant in July?

The Witness: In July.

Q. In other words, when you completed your August trip, you were to be laid up in Hull?

A. August voyage.

Q. In order to install refrigeration?

A. To put refrigeration in.

Q. You sailed from Hull, and you eventually arrived in New York, I believe it was testified it was August the 17th; am I right about that—about August the 17th?

A. About August the 17th.

Q. When you arrived, do you know about how much coal you had left in your No. 3 'tweendecks?

A. About 160 tons.

[fol. 339] Q. That is as near as you can figure?

A. As near as I can tell, to a few tons; it is impossible to tell to a ton.

Q. Had you expected to take any coal here in August on your return home, any extra coal?

A. Well, we had to have sufficient to take us back to Hull.

Q. And were you going to coal for the round on that voyage?

A. No.

Q. After you arrived here, did you receive any orders about coaling here in New York in August for the round voyage?

A. Yes, I ordered coal sufficient to coal us back to Hull, and then about August the 20th or somewhere around there we received an order to take 850 tons of coal for the "Francesco", who was taking our place.

Q. In other words, you were not going to take the coal for the round voyage yourself?

A. No.

Q. You were to take some extra bunkers for some other ship?

A. Yes, sir.

Q. What was the name of that ship?

A. I believe the "Francesco".

Q. What were you going to do with those extra bunkers when you got to Hull?

A. Discharge it into the "Francesco".

Q. I show you a cable dated August the 20th, 1926, and ask you if you ever saw that cable before. If you didn't see the cable, tell me (handing same to witness).

A. Never seen it before, sir.

Mr. Jones: I have no objection to this, this is from the owners in Hull to the Wilson Line here in New York.

Mr. Keating: To the New York agent.

Mr. Jones: No objection.

[fol. 340] Mr. Keating: I offer this cable in evidence as Respondent's Exhibit D.

(Same received in evidence and marked Respondent's Exhibit D.)

Q. Who told you that you were to take this extra coal, this extra 850 tons, for transference to the "Francesco"?

A. Mr. Sanderson.

Q. That is the same Mr. Sanderson that you spoke of a moment ago, that is now dead?

A. Yes, Mr. Lloyd Sanderson.

Q. After you got those orders to take 850 tons, what did you do?

A. I told the engineer the orders that we were getting, and we conferred as to where we should put them.

Q. And what did you decide?

A. Well, after the engineering measuring up the space in No. 3 'tweendecks and No. 3 shelter deck, we just about could get them in there.

Q. And you decided to carry them there; is that it?

A. Decided to carry them there.

Q. In connection with that decision, did you have any advice from the shore?

A. None whatever.

Q. Did anybody offer you any advice or suggestion as to where those bunkers should be put?

A. No, sir.

Q. This matter was decided by you in consultation with whom?

A. And the engineer.

Q. And he alone, nobody else?

A. I cannot say; probably the chief officer was there; we usually work with the chief officer; we got to work together.

Q. But nobody was there from the shore?

A. Nobody at all; they had nothing to do with it.

[fol. 341] Q. Does your company maintain a marine engineer or marine superintendent in New York?

A. No.

Q. You have got a superintending engineer in Hull; is that right?

A. Surely.

Q. You make your reports to Hull, do you, or to New York, in regard to your—in regard to anything you want to do about the ship?

A. To Hull.

Q. Do you report to New York, to anybody in New York, about the matters affecting the ship other than the loading of cargo, and so forth?

A. No, it is not necessary. If we want any repairs done, we let them know.

Q. And they send over?

A. No, they do not send it; I inform MacMillan that I want it, and that is left with me.

Q. The matter is entirely in your hands?

A. Entirely in my hands.

Q. When you are in New York?

A. Anything in connection with the ship is entirely in my hands.

Q. Did you go down into No. 3 'tweendecks before what has been called here the new coal was put in? Did you go down into No. 3 'tweendecks at any time?

A. Yes, we loaded the lower hold with grain, and then I was very particular that the coal should not get down to the grain; I saw the chief officer batten up this hatch, as near as I can tell, until 5 o'clock, and I left on the 24th of August, and I went down there specially to warn him that he should make a good job of this here, and he was down there and the engineer was also down there.

Q. What did you see the engineer doing?

A. He was looking at the coal, I would say.

Q. Was he walking around?

[fol. 342] A. Yes; he stood talking, I mean to say, and remarked upon the coal, that the space would just about get the new coal in.

Q. Now, did you make any personal inspection of the coal?

A. When I was there, I saw the coal there, and saw the way it was stowed.

Q. How was it stowed?

A. Well, it was taken over the hatch coaming, the sides of the hatch—and trimmed so it sloped towards the hatch.

The Court: From the sides toward what?

The Witness: From the sides of the ship to the hatch coaming, they were trimming it so that it would slope

towards the hatch coaming, in a sloping position, I should say from two to three feet from the deck, and about 3 feet from the hatch coaming.

By the Court:

Q. Two or three feet all over the deck?
A. From the top of the deck.

By Mr. Keating:

Q. From where it is up against the bulkhead?
A. From where it is up against the bulkhead, and from where it was against the ship's side.

By the Court:

Q. The pile was about two or three feet high on the deck?
A. The pile was seven feet high.
Q. And two or three feet from what?
A. From the deck head, being seven feet deep.
Q. From the shelter deck?
[fol. 343] A. From the shelter deck, which made a difference of about three feet at the hatch coaming.

By Mr. Keating:

Q. That is, between it and the hatch coaming?
A. All around the sides of the hatch coaming, had to clear that out, so as to get the tarpaulin battened down—nailed down.
Q. Now when would all the coal in No. 3 'tweendecks have been taken out of that space after, if you had continued your voyage?
A. Well, out of the 'tweendecks?
Q. Out of No. 3 'tweendecks.
A. It would be taken out at the rate of 40 tons a day.
Q. That was the coal that you—you burned that coal up as your bunkers?
A. Yes, sir.
Q. Were your permanent bunkers full when you left New York on your August voyage?
A. Well, I could not say.

Q. You had taken them—where had you put the coal for transference, that you intended to transfer to the "Francesco"—where was that coal?

A. In No. 3 'tweendecks and No. 3 shelter decks.

Q. When would it have come out of there, and when would it have been transferred to the "Francesco", on what date?

A. It is all according to what sort of a passage I had home—immediately I arrived in Hull.

Q. What is your ordinary sailing time from New York?

A. 16 days.

Q. So, what you are saying is, about the 13th or the 14th of September?

A. Give me a calendar, and I will be able to tell you.

Q. Of course, we can figure that out later; that would have been about 14 days after you left New York?

A. No, about 16 days.

[fol. 344] Q. About 16 days after you left New York?

A. That would be about the 14th of September.

Q. That coal was in a position to be taken out at that time; is that correct?

A. Yes, sir.

Q. Just what were you going to do with the steamer in Hull when you arrived there?

A. After I had discharged her, they were going to lay her up and put this refrigerating plant into her.

Q. Now, did you see them loading so-called new coal into the ship, into the No. 3 'tweendecks?

A. Yes, from the bridge; I did not inspect it.

Q. You were not there?

A. No, I was not there.

Q. You just happened to see them, as the stuff came aboard?

A. As the stuff came aboard; I mean, I saw the lighter alongside, and I saw them bringing it aboard the ship.

Q. How did they take it off?

A. Put it into hand buckets.

Q. Is that put into hand buckets on the lighter?

A. It is trimmed into buckets on the lighter and then dumped into barrows.

Q. Wheelbarrows?

A. Wheelbarrows; and dumped into the hatch coaming.

Q. Somebody wheeling the barrow over to the hatch coaming?

A. Yes, sir.

Q. And then dumped it down into the hatch?

A. Yes, sir.

Q. You saw them doing that, did you?

A. Yes, I saw them doing that.

Q. You did not inspect the coal?

A. No; the engineer did it.

Q. Who is it, on the "Galileo", who had charge of the coal?

A. The engineer.

Q. And by the "engineer", do you mean the chief engineer?

A. The chief engineer.

[fol. 345] Q. Are you a coal man?

A. No, sir.

Q. Are you a coal chemist?

A. No, sir; they call me a bonehead.

Q. Are you a combustion engineer?

A. No, sir.

Q. Is there anybody else on board the ship that has got charge of the coal in your steamer?

A. The engineer is the man, the chief engineer; I look to him, I mean to say, for everything in connection with the coal.

Q. Whose responsibility is it—he is responsible, is he?

A. The responsibility is his.

Q. Whose duty was it, if anybody's, to make an inspection of the so-called old coal in No. 3 'tweendecks in August, 1926, before any new coal was taken in?

A. The engineer's—chief engineer's.

Q. Was it anybody else's duty?

A. No, not to make a special examination of it.

Q. You did not make a personal examination?

A. No, I did not make a personal examination.

Q. Whom did you rely on?

A. The chief engineer.

Q. Did you see him down there?

A. I saw him down there; yes, sir.

Q. Do you know whether he had been down there often?

A. I should say he had.

Q. Had he been—had you seen him in and out of there on the voyage over, do you know?

A. Well, no, I could not say.

Q. You could not say?

A. I could not say, I kept no track.

Q. How many times did you see the chief engineer that you can recall now, if you can recall seeing him, that you do remember seeing him down there—once?

A. I remember seeing him down there the day before.

[fol. 346] Q. Is that the second occasion?

A. That is the second occasion; he was down there because——

Q. What was he down there for the second occasion for?

A. I could not say; making an inspection of the coal, I presume.

Mr. Jones: I move to strike out whatever the witness presumes.

The Court: It may be struck out.

Q. Now, who had charge of receiving that coal on board the ship?

A. The chief engineer.

Q. And who had supervision over its stowage on board?

A. The chief engineer.

Q. Now, did they eventually fill this space with coal, No. 3 'tweendecks and No. 3 shelter decks?

A. Yes, sir.

Q. Now, had you ever seen the wooden bulkhead which is in the fore part of No. 3 'tweendecks between No. 2 'tweendecks and No. 3 'tweendecks—had you ever seen that bulkhead?

A. Yes.

Q. Was that bulkhead—was that a temporary wooden bulkhead?

A. No; what you call a permanent bulkhead.

Q. Was it there when you joined the ship?

A. Yes.

Q. You don't know, do you, how long it was there?

A. No.

Q. It was there during the entire time you were on the ship?

A. The entire time I was there.

Q. Whose job is it on the ship, to inspect the bulkhead?

A. I trusted the chief officer with this duty.

Q. You trusted the chief officer to do that?

A. Yes.

Q. Did you ever, personally, inspect the bulkhead closely?

A. I am accustomed to go down in the holds every day.

[fol. 347] Q. For a look around?

A. For a general look around when they are loading cargo.

Q. When you got to Hull following what I would call the June voyage, but which really began in July, did you have any damage to the cargo in No. 2 'tweendecks from the coal that you carried on that voyage?

A. None whatever; if there had been any, I would have been the first to know about it.

Q. All those complaints immediately come to you?

A. All those complaints are made to me as soon as the cargo is discharged, or soon after. I am very particular about this coal getting mixed up with this cargo; that is the reason—one reason why I went down in the 'tweendecks, to see the chief officer battening up the holes and cracks, to make sure it was done to my satisfaction.

Q. You wanted to see that the coal dust did not get into any of the cargo?

A. I wanted to see that the coal dust did not get into any of the cargo.

Q. That is the reason you went down there?

A. That is the reason I went down there.

Q. Captain, are you able to form any opinion, from having seen that bulkhead, whether it would be possible for any amount—any considerable amount of air to go through it, assuming there was coal filled in on one side and cargo on the other?

A. Yes, I mean to say there would be very little.

Mr. Jones: He asked you whether you can form an opinion on that.

Q. Can you form an opinion on that?

A. This is what we call a dust-proof——

[fol. 348] Mr. Jones: I move that that be struck out.

The Court: Strike it out.

A. Yes.

Q. He says yes. That is, you have an opinion, you answer "Yes" to that?

A. May I have the question read over to me again?
Q. Yes, surely.
A. I was not quite clear on it.
Q. Just repeat it to him.

(Question repeated by the reporter as follows:)

"Captain, are you able to form any opinion, from having seen that bulkhead, whether it would be possible for any amount—any considerable amount of air to go through it, assuming there was coal filled in on one side and cargo on the other?")

In other words, can you form an opinion in your mind; in other words, what opinion have you, if you have an opinion?

A. I would think that no air would get through that bulkhead.

Q. No; I want to know whether or not you have any opinion, whether it might or might not; that is something that I am going to ask you about afterwards; I want to know whether you have something in your head, an opinion.

A. Yes, yes.

Q. Now, captain, could, in your opinion, assuming that coal was on one side of that bulkhead, which you saw, and cargo on the other, would it have been physically possible, in your opinion, for any considerable amount of air to pass through the bulkhead?

A. It could not.

Mr. Jones: I object to that, if your Honor please. In the [fol. 349] first place, I don't think the witness is qualified, has shown any qualifications to answer the question. My main objection is that the coal on one side and cargo on the other, and it seems to me that the question does not state the facts which he should state. I assume what my friend means is whether it is possible through the cargo and through the bulkhead, and then through that coal, and that I think is quite irrelevant to the inquiry. I think it is vague, and does not help us very much. I would like to have the captain describe to us the bulkhead so we may know something about it.

Mr. Keating: You can cross examine on that; he is a master mariner in charge of the ship; he can describe it.

The Court: I sustain the objection on the ground of incompetency, with an exception to you. I will specify that I

mean it is incompetent in form, and in addition to that I think it is a matter of common knowledge, and not a proper subject for expert testimony; and furthermore, the witness himself has not been proved competent on the question of whether or not air would pass through. I don't know that he knows any more about that than I. If it is a proper subject for expert testimony, you have got to qualify this man on his ability to determine when a partition is air-tight. I don't think it is a proper subject for expert testimony. Seems to me it would be a matter of common knowledge from the construction of that bulkhead.

Mr. Keating: I should think so too. I imagine that you [fol. 350] and I and all of us know what that bulkhead is, and can form our own opinions; but I think I am entitled to ask the question. Perhaps if I go along a little you will see whether I can ask him any competent question.

The Court: The only ground upon which I would consider admitting it would be, not on the question of whether or not the bulkhead was air-tight, but whether it was a proper degree of care that he was exercising. I am afraid it is incompetent on that also. The one question here is whether or not he was negligent himself, and his own ideas on the subject, I suppose, might be relevant, the ideas in his head at the time that he ordered this thing done, may be relevant upon the question of whether or not he was exercising due diligence.

Mr. Jones: I would like for him to tell how the bulkhead was made, so we can form our own opinion as to whether the thing was air-tight or not.

The Court: All right, go ahead, and note an exception for the respondent.

(Long discussion off the record.)

Q. Now, Captain, did you have a full crew on board, on the August voyage?

A. Yes.

Q. Did you have enough food on board?

A. Yes, sir.

Q. And may I assume that you had enough coal on board?

A. Yes, sir.

Q. Did you have any leaks in the ship?

A. None whatever.

Q. Had you been in any accident?

A. No, sir.

[fol. 351] Q. Anything about the ship needing repairs?

A. No.

Q. That you know about?

A. No, not on that voyage.

Q. Was the "Galileo"—do you know whether the "Galileo" was classed in any classification society—was she rated by anybody on the August voyage?

A. A-1 at Lloyds.

Q. Subsequently it was discovered, after you left New York, that there was a fire, and you turned around and eventually your ship foundered, having been filled with water by the Fire Department?

A. Yes, sir.

Q. And the ship was a total loss?

A. The ship was a total loss.

By the Court:

Q. Has it ever been put into service again?

A. No, sir.

Mr. Keating: I am informed, sir, she was raised to get her out of blocking the fairway out here, and subsequently sold for scrap in Baltimore and broken up. She was submerged for over a year. These pictures were taken immediately after she was raised, these photographs (indicating).

By Mr. Keating:

Q. Captain, had anybody connected with the New York agents given you any instructions where to stow this coal?

A. No, sir.

Q. Did you get any instructions at all about the coal, other than to take it?

A. None whatever; they left it entirely in my hands.

[fol. 352] Q. Did Mr. Sanderson or anybody in the New York office, ever come aboard your ship while you were loading?

A. Yes, occasionally.

Q. Do you know whether they did on this voyage or not?

A. I presume they did; every voyage they come aboard one day, probably the day we arrive or the day we sailed.

Cross-examination.

By Mr. Jones:

Q. Captain, I believe you stated that on your June voyage, you carried grain in your lower No. 3?

A. Yes, sir.

Q. And you had your lower No. 3 permanently fitted up for carrying grain, didn't you?

A. Yes; I don't quite understand what you mean by "permanently fitted up".

Q. You had a grain feeder running from the shelter deck down into the lower hold?

A. That is so.

Q. Isn't it a fact, that in your August voyage, your agents here had booked grain for your lower No. 3?

A. Yes.

Q. So you could not carry the coal in lower No. 3, could you, because the agents—your agents—had booked grain for the lower No. 3?

A. No, they had not.

Q. You did not book the grain, did you?

A. No; they booked it.

Q. Oh, they had booked it?

By the Court:

Q. Who booked it—the agents?

A. The agents would book it.

Q. Sanderson?

A. Sanderson.

[fol. 353] By Mr. Jones:

Q. And Sanderson was in charge of the owner's business here in New York, wasn't he?

A. Represented them.

Q. He had sole charge, didn't he?

A. No.

Q. Who else had charge, any charge?

A. I am in charge.

Q. Outside of yourself, Sanderson was the one who had the whole charge?

A. Well, he represented the owners.

Q. You did not book any cargo for the ship, did you?
A. No.
Q. You had nothing to do with booking cargo?
A. No.
Q. And isn't it a fact that there was a full cargo booked for this ship?
A. No.
Q. Were not you informed by Mr. Sanderson, when you came to New York, that he had booked a full cargo for your ship?
A. No.
Q. Did you make up this stowage plan?
A. No.
Q. Where was this stowage plan made up?
A. That was made up——
Q. I am showing you now Exhibit 13.
A. What am I to look at?
Q. Read him the question.

(Question repeated by the reporter.)

A. Made up on the pier.

By the Court:

Q. Who made it up?
A. One of the clerks on the pier.
Q. One of the clerks on the pier?
A. Yes.
Q. Sanderson's clerk?
A. Sanderson's clerk; yes, sir, that was made up when the ship was loaded.

[fol. 354] By Mr. Jones:

Q. When the ship was loaded?
A. Yes.
Q. And didn't you know that there was no other place on the ship where you could have put this additional quantity of coal?
A. Yes, there was.
Q. One minute—which you were carrying for this "Francesco", other than the places which you already did put it in?
A. I could have put it anywhere.

Q. Where could you have put it?
A. In No. 1 hold.
Q. No. 1 hold?
A. No. 2 hold or No. 3 hold.
Q. Wouldn't you have carried the wheat that they had booked for these holds?
A. Probably shut it out.
Q. You would not have carried it at all?
A. No.
Q. Be frank with me, Captain, isn't this a fact, that you, if you had carried this coal in compartments marked "A" and "B" on this stowage plan, you would have to shut it out, and not carried it at all?

Mr. Keating: Show him the plan.

Q. There is the plan; look at it and see and tell me if what I say is not so.
A. You mean to infer that no other place that I could have put the coal in down there?
Q. Exactly so; I say, it is a fact?
A. It could be put in other places.
Q. Where else would you have put it?
A. I could have put it in the shelter deck and No. 2.
Q. What would you have done with the cargo in the [fol. 355] shelter deck of No. 2?
A. There was none in it.

The Court: Let us see the plan.

Q. You mean to say that you could have carried this additional quantity in the shelter deck of No. 2, the whole additional quantity?
A. Yes.

The Court: Where—right here is it (indicating)?
Mr. Keating: It is marked No. 2, with some sort of a letter.

Q. You are showing us the space that you say you could have carried it in?
A. Down here (indicating).
Q. Mark that space with an "A"—that is already marked with "A".
A. That is No. 2, I presume (indicating). No. 2 shelter deck.

By the Court:

Q. You mean put it on the upper deck?
A. What we call the lower, or the 'tweendecks, or shelter deck.

(Discussion off the record between Court and counsel and witness.)

Mr. Keating: This space that you are talking about is marked with an "F"?
Mr. Jones: The space he is talking about is marked "F".

Q. Now, the space you have marked "F", Captain, shows from the plan that you had steel plates in there, and that [fol. 356] those steel plates were 60 feet long. Look at the plan and tell me if that is not so.
A. I cannot say, I cannot say that.

Mr. Keating: Have you got your glasses, Captain?

Q. All right; ask him the question over again. Read it to him.

(Question repeated by the reporter.)

A. How many plates?
Q. I didn't ask you how many; I am not asking you that question; I am asking you——
A. Steel plates?
Q. —the one question and only question is, now, does not the plan show that you had steel plates in what you call No. 2 shelter deck, and the steel plates were 60 feet long?
A. How many of them?
Q. I have not asked you that question.
A. Yes, sir.
Q. It does show that, doesn't it?
A. Yes.
Q. And shows that the steel plates were 60 feet long?
A. It says so here.
Q. Doesn't it show that there on the plan?
A. There is 8 steel plates, looks to me like it.
Q. It says on this "8 steel plates 60 feet"?
A. This may be inches.
Q. You know what you mean by inches, you put two

dashes for inches, and one for a foot, don't you? Am I not right about that, Captain?

A. Yes.

Q. The mate testified that this space which is marked "B" on this plan was 33 feet long; you agree with him on that, don't you?

A. Yes.

Q. And will you explain to me whether it would be possible to put steel plates 60 feet long in a space 33 feet long?

A. Won't you repeat that question.

[fol. 357] Q. I won't ask you that question; it is argumentative, and I should not have asked it; anybody would know as well as you do that it could not be done. But I will ask you this question: Isn't it a fact that if you had placed coal in No. 2 shelter deck, you would have had to place the coal on top of these steel plates?

A. I cannot recall where these steel plates were put.

Q. Isn't it obvious, Captain, that you could not have carried the coal in that compartment without putting the coal on top of the steel plates?

A. I may have put it in the forepart.

Q. How long a space was that space?

A. I could not say.

Q. You don't know? I can find out from your plan and demonstrate that without asking you about it. Now, Captain, your orders directed you to carry these bunkers, didn't they?

A. Yes, sir.

Q. And they, if they directed you to carry it as bunkers, you knew that they wished you to carry it in this space or these spaces "A" and "B", didn't you?

A. Carry what?

Q. You knew that they wished you to carry it there in the permanent or temporary bunker space of this ship?

A. They did not say where I was to carry it.

Q. Didn't you know, that if you carried that coal in No. 2 shelter deck, you would have to carry it as cargo?

A. No. It is carried as cargo wherever you put it.

Q. Captain, you carried the coal in No. 2 'tweendecks on a previous voyage?

A. No, we did not.

Q. No. 3 'tweendecks, on a previous voyage, I beg your

pardon; and when you got to Hull, didn't your owners come aboard?

A. A representative of the stevedores.

[fol. 358] Q. A man in charge of the owner of the ship, at Hull, came aboard, didn't he?

A. Yes.

Q. A marine superintendent?

A. Yes, sir.

Q. The highest man who has anything to do with the physical operation of your ships, came aboard, didn't he?

A. I could not say.

Q. Well, didn't he come aboard every voyage?

A. Yes, sir, no doubt he does.

Q. And he went all over the ship, didn't he?

A. I could not say.

Q. Doesn't he always go all over the ship?

A. Not necessarily.

Q. Isn't it a part of the routine for him to go all over the ship?

A. I don't know.

Q. Do you mean to say that you have been a master of a ship—how many years?

A. 29 years.

Q. 29 years, and you don't know that when you come to your home port, your marine superintendent does not go all over the ship?

A. It is not necessary to go all over the ship.

Q. Is not that a part of the routine of ship operation?

A. No, unless he had something to go for.

Q. Didn't you tell him, as a matter of fact, that you carried this coal in your 'tweendecks?

A. No.

Q. Did you not make a report to him as to the amount of coal you took?

A. He knows that already.

Q. From whom?

A. The engineer.

Q. The engineer makes a report to him?

A. No.

Q. How does he learn, if he does not learn it from the engineer?

A. He makes his report to the engineer superintendent.

Q. To the engineer superintendent?

A. Yes.

[fol. 359] Q. And is he the man in charge of that part of the owners' business?

A. The bunkers, yes.

Q. He came aboard, did he?

A. I could not say.

Q. Is not that man, that permanent engineer superintendent, in your own employ?

A. Yes.

Q. And the permanent marine superintendent in your own employ?

A. Yes, sir.

Q. And every time you come to Hull, this man comes aboard, these men that I have just mentioned, come aboard, don't they?

A. I don't know; if it is necessary, they would come.

Q. What?

A. If it is necessary, they would come on board.

Q. Do you mean to say that the practice in your line is for a marine superintendent, and an engineer superintendent, to come on board only in case of accidents?

A. Oh, no; they come on board and go all over the ship.

Q. Don't they inspect the ship?

A. They inspect the ship occasionally.

Q. How often do they inspect the ship?

A. Well, I could not say; when necessary.

Q. When do you say that it is necessary?

A. If there is anything happens, or there is a request to come aboard.

Q. Do you mean to say that they only inspect the ship, only when you have an engineer's request made to inspect the ship?

A. No; it may be inspected.

Q. How often do they inspect the ship?

A. I could not say; depends upon the nature and how thorough an inspection is needed.

Q. Be frank with me, captain——

Mr. Keating: I object to this characterization of the witness' testimony.

[fol. 360] Mr. Jones: I think the witness' evasion of my questions justifies it.

Mr. Keating: I do not agree with that.

A. (Interrupting.) I am not evading.

The Court: No, Mr. Keating, I will allow it; I think it is a just criticism of the witness.

Q. Now, isn't it a fact, that every time you come to Hull, that the marine superintendent and the engineer superintendent come aboard your ship and inspect your ship?

A. I could not say.

By the Court:

Q. Captain, cannot you enlighten us a little on the practice? In sitting here, in this Admiralty Part, month after month, I have found, and I have gotten the impression, that that was the general practice in all steamship companies, to have someone come on board the steamship at the end of every voyage. It has been testified to before me in many cases. Is yours a different practice than that?

A. The assistant superintendent comes on board the ship every time.

Q. Somebody in authority?

A. Yes, certainly.

Q. Someone comes with authority to see and inspect the ship, doesn't he?

A. Yes, sir; certainly.

Q. And you say it is always the assistant superintendent?

A. No; sometimes the superintendent.

Q. The superintendent or assistant to the superintendent?

A. That is so, sir.

Q. Invariably comes aboard and makes a more or less thorough inspection of the ship altogether?

A. Yes, they do.

[fol. 361] By Mr. Jones:

Q. And it would be obvious to him that you had carried coal in these 'tweendeck compartments?

A. They would know that. You are speaking now of the June voyage?

Q. Yes.

A. Yes.

Q. And it is obvious, too, captain, from this stowage plan, that the only place that you could have carried that coal was in No. 3 'tweendecks and No. 3 shelter deck and not placed the coal on top of the steel in No. 2 shelter deck?

A. I don't know exactly where I would place it; say in No. 2 shelter deck; there might have been some room; and there might have been room in there apart from the steel plates.

Q. I tell you, captain, that in No. 2 shelter deck is about 60 feet long. That that is about its dimensions. Under those circumstances, the steel plates would take up the main part of No. 2 shelter deck, considering the length of it; isn't that so?

A. I don't know how they are going to get the 60-foot plates down the hatchway.

The Court: Are you sure that those plates are 60 feet? Isn't that the indication on the drawing, that it is 60 feet?

Mr. Jones: All I am going by is the plan, your Honor; it says there, as your Honor will see there, 60 with a dash, which usually indicates 60 feet.

A. (Interrupting.) It is a physical impossibility to get the plates down there.

Q. Captain, did you ever hear of any ship being loaded other than filling up the spaces in the lower part of the ship before filling the spaces in the top part of the ship?

A. No.

[fol. 362] Q. Nobody else ever did?

A. No.

Q. And you would have put this coal in the 'tweendeck space rather than put it up higher in No. 2?

A. But the lower part of the ship was full.

Q. And everybody knew you were going to put the coal in that place, didn't they?

A. I don't know what you mean by "everybody". The engineer and the chief officer all knew it.

Q. Mr. Sanderson knew it too, didn't he?

A. I don't know whether Mr. Sanderson did or not.

Q. When you were presented with the plan, he must have known about it; isn't that so?

A. I arranged the plan, presumably.

Q. You drew up this plan?

A. I arranged the material.

Q. You reported it to Mr. Sanderson in his office, the plan was prepared by Mr. Sanderson's office?

A. After the cargo was in.

Q. Before you sailed?

A. Before we sailed, I suppose so.

By the Court:

Q. Who determined where the cargo was to be placed?

A. Me, sir.

Q. Sanderson had nothing to do about determining about what part of the boat should carry any particular material, do you say?

A. It was left entirely to me where to put the cargo.

By Mr. Jones:

Q. He did not leave it to you as to whether you were to carry this grain or to carry the coal, did he?

A. I mean to say, he gives me a list of the cargo; he knows the capacity of the ship, and it is left to me where to place the cargo.

[fol. 363] Q. And he told you you had to carry the grain?

A. He did not; I had the grain already.

Q. You knew you had to carry it in your lower hold, and he knew it too, didn't he?

A. That is the place were they put grain.

Q. That is the place that they carry grain?

A. Yes, sir.

Q. Everybody knows that, don't they?

A. Certainly.

The Court: I think we might shorten this: Do you contend that the owners are not responsible for placing the coal in these holds.

Mr. Keating: Absolutely; that is entirely up to the officers of the ship. Our contention is that it is a good place, and that the officers selected a good place to put the coal, and that the shipowners had nothing to do with it at all.

Mr. Jones: Our contention is obviously, that when they ordered this additional coal, that the owners must have known from their own plan of the ship, that the owners must have known that they would put it there.

The Court: That was made up for cargo use, was it?
Mr. Keating: Yes.

A. (Interrupting.) It is physically impossible to get these 60-foot plates down the hatch into a 60-foot deck, or any other number of plates of that length in there; I am sure there was no 60-foot plates there.

Q. Very well; you have told us that several times already. [fol. 364] A. Still you insist on it that there was these 60-foot plates there.

Q. You report, do you not, to your office here, the quantity of coal you have when you arrive?

A. Yes, I believe I did.

Q. And you report the bunkers and the places in the ship where the coal is, don't you?

A. No, sir.

Q. Don't you report, or your chief engineer report, the quantity of coal that is on hand, the bunkers, when you arrive?

A. No, sir.

Q. Don't you have forms which you make out stating the exact quantity that you have got in each bunker?

A. No.

Q. You have nothing to do with employing the stevedore?

A. No.

Q. And the stevedore does all the stowing of the cargo?

A. Under my directions and my instructions, under my supervision and the chief officer.

Q. Isn't it a fact that when you arrived here, you found this cargo all booked for your vessel?

A. That I could not say.

Q. You don't remember?

A. I don't remember.

Q. But you had nothing to do with the booking of it?

A. I did not book the cargo.

Q. Did you have anything to do with the purchasing of the coal that was put in these two compartments?

A. No, sir.

Q. That is, the shelter deck and the 'tweendeck.

A. No.

Q. The coal was purchased by Sanderson?

A. I don't know if by Sanderson & Son or the Ellerman's Wilson.

Q. Purchased by a representative of the Ellerman's Wilson Line; that is right, isn't it?

A. I don't know.

[fol. 365] Q. At any rate, you had nothing to do with the purchase of it?

A. No.

Q. Who delivered the coal to you?

A. Well, they gave me lighters.

Q. Did you know where they came from?

A. No.

Q. Do you know by whom it was brought to you?

A. I ordered it to be sent down alongside the ship.

Q. Mr. Sanderson told you the coal had been ordered, didn't he?

A. I told Mr. Sanderson to order it.

Q. You told Mr. Sanderson to order it?

A. Yes, after I got orders from Hull to take it.

Q. From whom did you get the orders—direct from Hull by cable?

A. No; from Mr. Sanderson.

Q. Do you mean to say that you told Mr. Sanderson to buy this coal?

A. No; I told him to order it alongside.

Q. As a matter of fact, what happened was that Mr. Sanderson told you to take the coal, didn't he?

A. He told me he received instructions from Hull.

Q. He told you you were to take the coal?

A. To take the coal; and it was passed on to me.

Q. Who actually loaded the coal on board?

A. The coal gang.

Q. Did you employ the stevedores who did the loading?

A. No.

Q. Who employed them?

A. I presume it is Mr. Sanderson employed these men.

Q. Now, as I understood you, this coal was hoisted from lighters in buckets? A. Yes.

Q. And the buckets were emptied into barrows?

A. Yes.

[fol. 366] Q. And the barrows were wheeled across the deck?

A. Yes.

Q. And dumped over the hatch coaming into the hatch-

way and the coal fell over the weather deck down to the 'tweendecks?

A. Yes, as near as I can recollect.

Q. Was there any trimming done to the coal after it came down to the 'tween decks?

A. There would be.

Q. Who did that?

A. Trimmers.

Q. Stevedores?

A. Trimmers.

Q. Trimmers, employed by whom?

A. By Mr. Sanderson.

Q. I show you Exhibit No. 16, and ask you if this book was ever called to your attention?

A. I have never seen that book.

Q. No one has ever called that book to your attention, has there?

A. No.

Q. I show you Exhibit No. 17 for Identification, and ask you if that pamphlet has ever been called to your attention.

A. Well, I have seen something similar to it.

Q. You have seen something similar to that?

A. Yes.

Q. You know it is an official publication of the Board of Trade, don't you, by looking at it?

Mr. Keating: I object to that your Honor; how can the man tell that?

A. May I look at it again? I see it is by the Board of Trade.

The Court: Sustained.

Mr. Jones: Exception.

[fol. 367] Q. I ask you whether or not the following circular of the Board of Trade was ever called to your attention by your owners:

"Masters and officers of ships loading coal at ports in the United Kingdom, are warned that accidents have frequently occurred through the ignition of coal gas. All hatchways should therefore be left open, both before and for some time after cargo is shipped, and as the gas may find its way into forecastles and cabins, owing to the bulk-

head not being gas-tight, a free circulation of air should be provided for in holds and other spaces below deck. In order to secure adequate surface ventilation, at least two ventilators should be provided for each hold or compartment in which coal is stowed; these ventilators should be of wrought iron or wrought steel, fitted with cowls and placed at opposite ends of the compartment, or as far apart as circumstances will permit. In the event of adequate ventilation not being provided, the vessel will be liable to be detained. Any further information required on the subject of ventilation, may be obtained on application to the offices of the Board of Trade."

Was that ever called to your attention?

A. I know the ship is constructed according to Lloyd's rules.

Q. I didn't ask you that.

A. No, it was not.

Q. This was never called to your attention?

A. No.

Q. You have said that Exhibit No. 17 was never called [fol. 368] to your attention?

A. It never was called to my attention.

Q. Then was the following notice ever called to your attention?

"In the official notices for 1912, issued in Great Britain, Notice 11 coal cargoes, was as follows: The attention of the master is directed to the following recommendations of the Royal Commission appointed to inquire into the causes of spontaneous combustion of coal on board ship; that the breakage of coal in its transport from the pit to the ship's hold, the shipment of pyritic coal in a wet condition, and especially ventilation through the body of coal cargoes, conduce to spontaneous combustion, even though the coal may not be unfit for conveyance on long voyages; that when coal is being carried on long voyages, the temperatures in the various portion of the cargo should be tested periodically by thermometers and registered in the log; that with a view to guarding against explosion, free and continuous egress to the open air independently of the hatchways, should be provided for the explosive gases by means of a system of surface ventilation which would be

effective in all circumstances of weather; in the event of an inquiry into any casualty arising on board this ship from spontaneous combustion or explosion, neglect on the part of the master or officers of these recommendations, will be brought to the notice of the court. The master is also [fol. 369] warned that in the event of his vessel being found to be in a state dangerous to human life, either from through ventilation which is conductive to spontaneous combustion of the coal, or from not having sufficient surface ventilation to carry off explosive gas, he will render the ship liable to detention for unseaworthiness and himself and the owners liable for prosecution for taking a vessel to sea in an unseaworthy condition. Masters and owners of ships carrying coal are also warned that gas from the hold or 'tweendecks may find its way into the forecastle and cabins if the bulkheads are not gas-tight. Persons in charge of coal laden ships should bear in mind the dangers resulting therefrom the consequent impropriety of introducing naked lights in these places."

Was that circular called to your attention?

A. Or a similar one that came from or issued by the Board of Trade; it is a notice to mariners of those things. I cannot recall that one.

Q. You cannot recall that one?

A. I cannot recall that that especial one was; but others similar to that.

Mr. Keating: You mean similar ones were received?

The Witness: Notices to mariners.

Q. Did your owners ever call your attention to this?

A. I cannot say that they did; I do not recall it; but similar ones have been; I mean to say, about the dangers of coal and the ventilation of coal.

[fol. 370] Q. What days did you receive those?

A. I could not tell you.

Q. Did you take any precaution at all to prevent air going through this coal?

A. There is two ventilators on the deck.

Q. How does that prevent air going through the coal?

A. No air could go through the coal. It is stowed in what is called dust-tight bulkheads which is as near air-tight as possible to make it.

Q. You know a dust-tight bulkhead is not an air-tight bulkhead, isn't it?

A. It is as near air-tight as it is possible to make it.

Q. You know it is not air-tight, I didn't ask you the other question, you know it is not air-tight, don't you, Captain?

A. Well, I don't suppose any wooden bulkhead is perfectly air-tight; but what little air gets through that would not affect that.

Q. You don't know a thing about that, do you, whether it would or would not affect it?

A. I don't know anything much about coal; but I know that I know very little about coal.

Q. Can you recall any specific time when your owners called to your attention, the danger of carrying coal?

A. No.

Q. And what is to be guarded against in carrying coal?

A. No, because we never carried it, but just bunkers.

Q. Never carried it?

A. No.

Q. Do you know whether or not there is a gentleman named Mr. Thomas Nevins, who worked for your owners here in New York?

A. Never heard of him.

Q. Whom, if anybody, is the superintending engineer of your owners here in New York?

A. Haven't got one.

[fol. 371] Q. Who has charge of the physical condition of the ships of your owners here in New York?

A. I have.

Q. You have?

A. Yes.

Q. Do you know a gentleman named Capt. Isbester?

A. Yes.

Q. What is his job?

A. Just an official of the other lines.

Q. He had nothing to do with your ship?

A. Unless he is called in.

Q. Who calls him in?

A. If it is necessary I would get him to come down on board.

Q. If he has no connection with your owners, why do you call him in?

A. He is superintendent for the combine—he is one of the combines.

Q. As a matter of fact, was not he aboard your ship in August and June, 1926?

A. I cannot recall it.

Q. What do you mean by the "combine"?

A. I mean to say, there is the Ellerman's Wilson Line and there is the Ellerman Bouker Hull Line, and there is the City Line.

Q. You would say one management runs the whole outfit?

A. I think the Wilson Line is under a separate management; I don't know much about it.

Q. You made out a manifest before you sailed from New York?

A. No.

Q. Somebody had to make it out before you sailed.

A. Yes.

Q. Who made out the manifest?

A. I could not say.

Q. Made out by the office?

A. Made out by the office.

Q. Didn't you have to swear to it?

A. No.

Q. You didn't swear to it?

A. No.

[fol. 372] Q. In order to get clearance, didn't you know and don't you know, that your manifest had to be filed?

A. I suppose so; yes.

Q. You had to get clearance yourself, didn't you?

A. No, I go with someone appointed from the office to the customs house to get clearance.

Q. Don't you have to get clearance under your own name as master of the ship?

A. Yes.

Q. You have to file the manifest to get the clearance?

A. I don't know what they file.

Q. Now, Captain, don't you know as the master of the ship, that you have to go and make an oath?

A. That is so.

Q. And have to make an oath as to the correctness of your manifest?

A. That is correct.

Q. What did you mean by telling me that you didn't know that the manifest was filed? Do you mean to say that you make an oath to a manifest as being correct when you didn't know it is so?

A. I know the manifest is made up and has to be correct; you've got to trust to one of the offices to do that, because I cannot identify every item on the manifest.

Q. The manifest is made up by the office and you go and swear to it because the office says, "Captain, here is your manifest"?

A. No, I would not do that way.

Q. What do you do?

A. I got to swear to the manifest, that it is correct.

Q. Without reading it over?

A. I have seen some of the things.

By the Court:

Q. Whom do you say makes it out—the office, or one of the officers? I am not sure I heard you right?

A. The office.

[fol. 373] Q. The office?

A. Yes.

Q. That is, Sanderson's office?

A. Sanderson's office.

By Mr. Jones:

Q. Then you swear to it without reading it over?

A. I read it over—I mean to say, I look at it.

Q. What do you mean to say, by telling me just now, that you didn't know anything about a manifest?

A. I didn't say I didn't know anything about it.

Q. I understood you to say so.

A. I didn't mean that.

Q. You didn't mean a number of things that you testified to here today, did you, Captain? You didn't mean that you had to stow the coal between No. 3 'tweendecks because that is the only place you had to stow it?

A. I didn't say I had to stow it.

Q. You knew that is a fact, though?

A. It is not the fact; I have told you there is other places to stow it.

Q. Put it on top of these steel plates?

A. There is plenty of room apart from putting it on top of the steel plates.

Q. Where else would you put it?

A. Put it in the shelter decks.

Q. Where the steel plates were?

A. Yes, perhaps by the side of where the steel plates were.

Q. In the shelter deck, according to the stowage plan, shows——

A. You say 60 feet long, and you cannot get a 60-foot long plate down there.

Q. Don't you know 850 tons of bunkers is shown on your manifest? Were not they shown as being bunkers, on your manifest?

A. 850 tons?

Q. Yes.

A. In the shelter deck.

[fol. 374] Q. You have 850 tons of coal?

A. Yes.

Q. Which you carried pursuant to orders from your owners?

A. Yes.

Q. You had to make some notation in your manifest respecting that 850 tons of coal, didn't you?

A. Yes.

Q. What notation did you make in your manifest respecting the 850 tons of coal?

A. I cannot recollect.

Q. You cannot?

A. No.

Mr. Jones: Have you got the manifest?

Mr. Keating: No; but we will get it for you if you want it; do you want it?

Mr Jones: I should.

Mr. Keating: It is filed in the custom house.

Mr. Jones: And I will send a subpoena down there for it.

(Adjourned to Monday, November 11, 1929 at 10:30 o'clock A. M.)

New York, November 11, 1929.

(Met pursuant to adjournment at 10:30 A. M., present as before.)

Mr. Keating: May I proceed, sir?

The Court: Yes, certainly.

JOHN OXTOBY, being duly sworn and examined as a witness for respondent, testifies:

Direct examination.

By Mr. Keating:

Q. Mr. Oxtoby, do you hold a chief engineer's license?

A. Yes, sir.

[fol. 375] Q. How long have you held that license?

A. Since 1902.

Q. And before that did you hold any other license?

A. Yes, sir, second engineer's license.

Q. How many years have you been going to sea as a chief engineer?

A. As chief engineer, 14 years.

Q. Although you held your license longer than that?

A. Yes sir.

Q. But your actual service has been 14 years?

A. From—yes, from 1915.

Q. And how many years going to sea as an engineer?

A. Well, since I was 21—33 or 34 years.

Q. You have practically served all your manhood as an engineer on ships?

A. Yes, sir.

Q. Coal burners?

A. All coal burners.

Q. And from whom did you get your chief engineer's license?

A. Board of Trade.

Q. British Board of Trade?

A. British Board of Trade.

Q. How many years have you been wholly employed by the Ellerman's Wilson Line, Ltd.?

A. About 29 years, sir.

Q. You are still in their employ?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Where is your home?

A. 53 Claremont Avenue, Beverly Road, Hull.

Q. Have you any children?

A. Yes—six.

Q. When did you join the "Galileo"?

A. November—on or about November, 1924.

Q. 1924 or 1925?

A. 1924.

Q. 1924?

A. 1924.

Q. And how long did you serve on her?

A. That is since I was chief, I was appointed chief over here in 1924, but I was second engineer of her before that.

[fol. 376] Q. When did you join her as second engineer?

A. 1908.

Q. How long, all told, have you served on the "Galileo"?

A. About 9 years altogether.

Q. Are you sure that it was November, 1924, when you joined the "Galileo" as chief engineer?

A. Yes, yes, yes.

Q. Where was she at that time?

A. She was in Hull.

Q. Had she been undergoing any repairs, or anything of that sort?

A. Not in 1924, no.

Q. Where did she go during the year 1924?

A. She went on her usual runs.

Q. Which were they?

A. Hull, Boston, New York, Newcastle; they varied; that was about her usual run.

Q. Her usual run was New York, Boston and Hull, Newcastle, is that right?

A. Yes, sir.

Q. Now, prior to June, 1926, where used you to coal for the round, if you did coal for the round?

A. Well, either in Hull or in Newcastle.

Q. What is the capacity of your permanent bunkers?

A. 740 tons.

Q. Where did you carry, prior to June, 1926—where did you carry your surplus coal?

A. In the No. 3 lower hold.

Q. Was that the usual practice?

A. Coming out it is, yes.

Q. That is, if you were coming from Hull to New York you carried surplus coal in No. 3 lower hold?

A. No. 3 lower hold, yes.

Q. When you got to New York what was done with that coal?

A. Well, it was taken out of there and put in the permanent bunkers.

Q. And then you would sail back with that coal in your bunkers?

A. Yes, sir.

[fol. 377] Q. And go through the same process again, is that right?

A. Yes, sir.

Q. Sort of a circle?

A. Yes, sir.

Q. Now, in the Spring and Summer of 1926 was there any difficulty with coal in England?

A. Yes, sir, there was a coal strike on.

Q. And during that period were you able to get any coal in England?

A. No, no, no, not able to get any coal.

Q. Now, when you arrived here in June, I think it was the 21st of June, according to the libel, did you have any coal in No. 3 lower hold at that time?

A. No, no.

Q. Now, did you have on any surplus bunkers in New York on that trip?

A. On that trip, yes.

Q. Was that the first time you had done that?

A. The first time we had taken for the round, yes.

Q. Where did you put that extra coal?

A. In the No. 3 lower between decks and in the No. 3 shelter deck.

Q. And approximately how much did you put in each space?

A. No. 3 between deck about 350 to 360 ton.

Q. That approximately filled that space, did it?

A. Yes, sir.

Q. And how much did you put in the No. 3 shelter deck?

A. About the same quantity, similar to 350 tons.

Q. Has No. 3 shelter deck got a wooden bulkhead at the forward end?

A. A wooden bulkhead at the forward end, yes, sir.

Q. And what kind of a wooden bulkhead is that as related to the No. 1 in No. 3 shelter deck forward?

A. Well, practically the same, I mean it is a wooden bulkhead.

[fol. 378] Q. What kind of a bulkhead is there at the after end of No. 3 shelter deck?

A. Well, steel; a steel.

Q. In the way of the hatch?

A. In the way of the hatch, and wood at each side.

Q. How does that compare with the bulkhead in the deck below, that is, in the No. 3 between deck?

A. The same thing applies.

Q. Now, aft of the after bulkhead, that is, this steel bulkhead with wood in the wings in No. 3 shelter deck and No. 3 between decks, what do you carry?

A. Carry coal.

Q. Is that space immediately aft of those bulkheads part of the permanent bulkhead?

A. Part of the permanent bulkhead.

Mr. Jones: I move to strike it out.

The Court: I will let it stand.

Mr. Keating: I am sorry; Mr. Jones' point is well taken.

By the Court:

Q. The rear of the permanent bulkhead is a steel bulkhead, is it?

A. The rear of the bulkhead, yes, sir.

Q. Steel all the way across?

A. Yes, sir.

By Mr. Keating:

Q. In both the between decks and the shelter deck?

A. We are talking of the rear bulkhead are we?

Q. Yes.

A. In the shelter deck, no, sir.

By the Court:

Q. Your permanent bunkers don't go up to the shelter [fol. 379] deck, do they?

A. No, sir; no, they go just up to the shelter deck.

Q. But no part of the shelter deck space is included in the permanent bunkers?

A. No, sir.

By Mr. Keating:

Q. Now, Prior to June, 1926, had you ever carried coal in No. 3 shelter deck?

A. Oh, yes, we carried it in the No. 3 shelter deck.

Q. Had you any difficulty with the coal that you carried there?

A. None whatever.

By the Court:

Q. Why would you carry it in the shelter deck? You told me you carried the surplus in the lower hold of No. 3?

A. Yes, and so much of it in the shelter deck.

Q. It wouldn't fit in the lower hold?

A. No, and we carried it in the shelter deck.

By Mr. Keating:

Q. Prior to June, 1926, while you were aboard this steamer had you ever carried any coal in No. 3 between decks?

A. No, sir, no.

Q. When was the first time you put coal in No. 3 between decks?

A. On that occasion in June.

Q. Do you know what they put down in the lower hold in June, 1926, No. 3 lower hold?

A. Yes, grain.

By the Court:

Q. Why did you make the change from the lower hold to the between deck in June?

[fol. 380] A. Well, we just carried the coal coming out for stability of the ship, but we had grain in the No. 3 lower hold.

Q. You told me the practice had been to carry coal for the return trip in the No. 3 lower hold?

A. Yes sir.

Q. And then in June you changed that practice and started to carry coal in the No. 3 between decks?

A. Yes, sir.

Q. And put grain in the lower hold?

A. Yes, sir.

Q. I was interested to know why you changed.

A. I don't know any particular reason, sir, because the coal was just as handy for me in the No. 3 between decks as in the lower hold; in fact, it was handier for me to work with.

Q. What kind of bulkheads did you have in the lower hold?

A. Wood and steel.

Q. Wood forward?

A. Yes, sir.

Q. The same sort as in the between decks?

A. Yes, sir.

By Mr. Keating:

Q. You said something to his Honor about stability. Did you have any grain to carry from Hull to New York?

A. From Hull to New York.

Q. Yes.

A. No.

Q. Explain your statement about stability.

A. Well, coming out the ships are usually light as to their cargoes, and there was very little cargo, so the coal was usually put down there so the ship would be in trim coming out.

Q. You mean to say you would get some weight in the bottom?

A. Yes, sir.

Q. Now, leaving New York how did you get some weight [fol. 381] in the No. 3 lower hold?

A. By the grain.

Q. Now tell the Court how it was decided, and by whom, to put some of the coal in No. 3 between decks in June, 1926?

A. Well, the captain told me that we were going to carry coal, and suggested to me that the between decks would be the best place to put it, and I said yes.

Q. And that was the occasion of its being put in?

A. Yes, sir.

Q. Now, prior to putting any coal in No. 3 between decks was there anything else in there at that time, any commodity of any kind?

A. When we put the coal in?

Q. Yes.

A. No, sir.

Q. Before you left on the June trip did you make a memorandum in writing of the coal you had on board on arrival, the coal that was loaded while you were here, the coal shifted, the coal consumed, and the coal on board while leaving?

A. Yes, sir.

Q. I show you a memorandum and ask you if that is your signature attached to that memorandum?

A. Yes, sir, it is.

Mr. Keating: I ask that it be marked in evidence.

(It is marked Exhibit E of this date.)

Q. Mr. Oxtoby, will you look at Exhibit E and tell me which parts are in your handwriting and which parts are in someone else's handwriting?

A. Well, the figures are in my handwriting, but the other writing is of course made out by a clerk or somebody, I don't know who would make it out really.

[fol. 382] Q. That is the usual form that is given you, is it?

A. Yes sir.

Q. What do you do with this after you fill it out?

A. I hand it to the clerk usually just a bit before sailing.

Q. Just before you leave?

A. Yes, sir.

Q. Now, Exhibit E shows the coal situation on board your vessel as far as quantities are concerned when you left here in June, 1926?

A. Yes, sir.

Q. Now, after you left here in June, 1926, where did you go?

A. We went to Hull.

Q. And what did you do in Hull with respect to any coal?

A. Well, in the No. 3 between decks they had so much of it to move so that the grain could be worked from the lower hold.

Q. Do you know how much they took out?

A. Well, I sould say about 160 tons.

Q. Now, what did they take out of the shelter deck? Did they take some out of there too, No. 3 shelter deck?

A. No, they didn't take any out of there.

Q. On the way over to Hull did you use any of that coal?

A. Yes, I used as much as I could get away with; I think we used 30 or 40 ton over.

Q. And where did that come from?

A. Out of No. 3 between decks.

Q. Now, how did you get down through the grain to the coal that was in No. 3 shelter deck or hold? Did you take any out of there?

A. Oh, yes, yes.

Q. How much did you take out of the shelter deck?

A. No, no, that wasn't necessary, out of the shelter deck, that wasn't necessary.

Q. You didn't take any out?

A. No.

[fol. 383] Q. How did you get down through the grain in No. 3 shelter deck to get coal in the hold?

A. We must have worked that coal away ourselves to get at the hatch on the passage home.

Q. So some sufficient coal came out of No. 3 between decks and No. 3 shelter decks to get at the grain?

A. Yes, sir.

Q. That was the only way to get at the grain, wasn't it?

A. That is right, sir.

Q. Did you take any coal in Hull when you finished what I call the June trip?

A. No, we did not.

Q. Did you do any shifting of coal in Hull?

A. No, there was only that bit moved that I say they had to clear that hatch, that was the only movement of the coal.

Q. Now, you came back to New York, I think it has been testified that you arrived here on August 17, 1926. Now, at that time was there any coal left in No. 3 shelter deck?

A. Yes, sir, there was some left in the shelter deck.

Q. How much, do you know?

A. About 100 tons.

Q. And was there some coal left in No. 3 between decks?

A. Yes, sir.

Q. Do you know about how much?

A. About 160.

Q. Now, on the voyage out, which ended here on August 17, 1926, did you go in either of those places, that is, No. 3 between decks and No. 3 shelter deck?

A. Yes, sir.

Q. Which one did you go in?

A. I went in both.

Q. What for?

A. To see the quality of the coal and to see the conditions and to see how much coal I wanted.

[fol. 384] Q. Did you use any of that coal out of either space on the voyage from Hull to New York, ending here in August?

A. No.

Q. How many times over were you in those spaces, No. 3 between decks and No. 3 shelter deck?

A. Well, it is difficult to recollect all this time ago but I was certainly down there on three or four occasions.

Q. What did you do when you went in those spaces?

A. Felt the coal to see that it was all in order.

Q. Did you go into any of the other bunker spaces on the ship?

A. Always; that is my regular duty, go around, whatever coal there is.

Q. Why do you go in there to look at the coal?

A. To see the condition of it.

Q. What condition do you mean, whether it is still coal?

A. No, whether it is in good condition or whether it is heating, or anything of that sort.

Q. Has the chief engineer got any regular duty in connection with that?

A. Yes, sir.

Q. It was part of his job, was it?

A. Yes, sir.

Q. Were you expecting to take coal here in New York in August for the round voyage?

A. No.

Q. Why not? Was the coal strike over?

A. No, because we were going to lay up that voyage to fix up the refrigerating apparatus.

Q. Now, did you take extra coal here in August, 1926?

A. Yes, sir.

Q. How did the matter come to your attention that you were going to take extra coal?

A. The master told me.

Q. What did he say?

A. He told me we were going to take extra coal here for our other ships.

[fol. 385] Q. Now, following that conversation, what did you do, if anything, about taking on extra coal? Did you do anything?

A. I looked at my space in No. 3 between decks and shelter deck and told them what we could take in there.

Q. Did you estimate how much was there?

A. Beg pardon?

Q. (Repeated.) Did you estimate how much was there?

A. Yes, sir, and how much we could take.

Q. When did you first go into those spaces in New York with reference to the time you loaded the new coal?

A. On the previous evening to when they were going to start the coal.

Q. About what time was that?

A. Well, it would be after the grain was finished in the lower hold, I suppose between 4 and 5 o'clock on that day.

Q. Now, your visit was the afternoon before the day they started to load the new coal?

A. Yes, sir.

Q. Did you go into No. 3 shelter deck at that time?

A. Yes, sir.

Q. Did you go into No. 3 between deck?

A Yes, sir.

Q. What did you do and what did you see at that time?

A. I felt the coal and to my mind it was quite all right to put the new supply on it.

Q. Did you put your hand on it?

A. Yes, sir.

Q. How did it feel?

A. It felt just about the same as it would feel for that time of year, I thought.

Q. Now designate the coal as cool, warm or hot; which would you say it was?

A. I should say it was warm.

[fol. 386] By the Court:

Q. Was it warmer than the parts of the ship?

A. No, sir, I don't think so. Of course, it was in August, that time of year, and everything is a bit warm, though I didn't think it was any more than normal.

Q. Do you mean about the temperature of the air also?

A. Well, it may have felt a little warmer than that, sir, but nothing dangerous.

Mr. Jones: I move to strike out the latter part of his answer.

The Court: I will allow it to stand, with exception.

Q. What parts did you feel?

A. All round the surface coal, sir, all round the forward and the two sides.

Q. All on the same level with your shoulder, about?

A. No, in the middle way, and I had a good feel all over it.

By Mr. Keating:

Q. Why did you feel the coal, chief?

A. Well, it was my duty to do so.

Q. And what was your purpose in putting your hand on the coal?

A. To make sure that it would be quite all right to put the other coal on top of it.

Q. Is it part of your duty to inspect the coal?

A. Yes.

Q. Is it part of your duty to make a proper inspection?

A. Yes, sir.

Q. Now, when you left here in August, 1928—

A. 1926, sir.

[fol. 387] Q. I mean 1926; did you make any report similar to the ones that you made of the June voyage, which is marked Exhibit E? (Showing witness paper.)

A. Yes, that is a similar report I made on that voyage.

Q. This is the August voyage on which you were lost?

A. Yes, sir.

Mr. Keating: I ask that it be marked in evidence.

(It is marked Exhibit F of this date.)

By the Court:

Q. You didn't do other than just feel the surface of the coal?

A. I put my hand into it.
Q. Put your hand into it?
A. Yes, sir.
Q. How far in?
A Well, to beyond the wrist.
Q. What was it, powdered, finely divided coal?
A. Usually the American coal is very fine.
Q. How did you get your hand in?
A. Well, by working it; you could work your hand in the coal.
Q. Did it feel warmer inside than on the surface?
A. No, not to me, sir. Well, I might qualify that and say that it would be a little warmer than it was on the surface; nothing detrimental to that, though.
Q. I understand you to say that the coal felt warmer than the air?
A. Yes, sir.
Q. Do you mean that it also felt warmer than, well, the woodwork or the iron work on the ship down in the between deck? Just consider the temporary bunker, Did you happen to feel that at the same time?
A. The wood or anything like that?
[fol. 388] Q. Yes.
A. No, sir, I didn't, no. It may have felt slightly warmer than that.

By Mr. Keating:

Q. Mr. Oxtoby, tell me which part of Exhibit F is in your handwriting.
A. The figures, and also the signature.
Q. The remainder is the writing of a clerk, is it?
A Yes, sir.
Q. And what did you do with Exhibit F when you filled it out?
A. Handed it back to the clerk.
Q. One of the agent's clerks?
A. Yes, sir.
Q. On the pier?
A. Yes, sir.
Q. How long before sailing?
A. Just a few hours, generally the last day it comes.
Q. That is the last thing you do?
A. Yes, sir.

Q. You have to put on it, do you not, the amount of coal consumed in port?

A. Yes; I can't make it up generally until the last thing, for you have to make it up with the quantity of coal consumed in port.

Q. Did you see anyone else down there in No. 3 between decks while you were there in August?

A. Yes, sir.

Q. Who else did you see?

A. The chief officer was down there.

Q. What was he doing?

A. Looking after his hatch to see that everything was in good order.

Q. That is the hatch over the grain?

A. Yes, sir.

Q. Was he physically doing some work himself?

A. No, I can't say that he was physically doing it, but he was looking over to see that it was battened down and all in good order.

Q. Did you see anyone else there?

A. Yes, the master came down too.

[fol. 389] Q. What was he doing?

A. He was having a look at his part of the place to see that the mate had carried out his part battening all the holds to keep the coal dust away, and so on.

Q. And whose duty was it on the "Galileo" to look after the coal?

A. Mine.

Q. Was there anybody else on board had anything to do with it?

A. No.

Q. Whose duty on the "Galileo" was it to determine whether the coal was cool or warm or hot or safe or dangerous?

A. Mine.

Q. Was it anybody else's duty?

A. No.

Q. Did the owners have a Marine Superintendent in New York?

A. Not to my knowledge.

Q. Have they got a Superintendent Engineer in New York?

A. Not to my knowledge.

Q. Did you ever meet him?

A. No.

Q. Anybody of that character on the ship in August?

A. No.

Q. Anybody fom the shore, the agent or anybody of that character, give you any orders about that coal in August, 1926?

A. No.

Q. Before you put any coal in No. 3 between decks in August how much coal did you say was left from the previous trip?

A. About 160 tons.

Q. And when had that 160 been put in there?

A. In June previous, the June voyage.

Q. That was on June 30th, wasn't it?

A. Yes, sir.

Q. Will you describe to his Honor the coal pile, the form that that 160 tons took?

A. Yes, say it was a space like this room, there will be coal going down the sides and also at the forward end, and the hatch would be here (indicating), probably where the desk is, and the coal would run down to the hatch about 4 feet clear of the hatch.

[fol. 390] Q. That is the forward end of the hatch?

A. Yes, sir.

Q. What is the coal against forward of the hatch?

A. Against the wood bulkhead.

Q. And how high up—how far down did the pile come that was against the wooden bulkhead from the next deck?

A. I should say 3 or 4 feet.

Q. With reference to your inspection of the coal did you go in that space again yourself before they loaded the coal?

A. No, not that day.

Q. Prior to loading coal in No. 3 between decks what was the last time you personally went into No. 3 between decks?

A. On the evening previous.

Q. Previous to what?

A. Previous to the day we started loading.

Q. You started loading the next morning?

A. Yes, sir.

Q. I think the logbook shows it was August 25th.
A. Am I right about that, Mr. Jones?

Mr. Jones: I think so.

Q. I think it shows August 25th. Were you there while the coal was being loaded?
A. Yes, sir.
Q. Where were you?
A. On deck.
Q. Which deck?
A. On the main deck, where we were taking the coal in.
Q. The weather deck?
A. Yes, sir.
Q. Where did they take the coal from?
A. From the lighter.
Q. Where was the lighter?
A. Alongside of the ship.
Q. And how did they get it out of the lighter into the hold?
A. By buckets.
[fol. 391] Q. Well, how did they get it in the buckets? Just describe the operation from the time——
A. Well, there would be men on the lighter filling these buckets, and when each bucket was filled it would be swung over and the contents of the bucket put into a wheelbarrow and wheeled over the hatch and dumped into the hatch.
Q. Before that operation took place had they trimmed any of what they called the old coal?
A. No, they hadn't trimmed any.
Q. Who was in charge of the coal trimmers, do you know?
A. Well, I don't know the man by name, but he was the man that had been there on several—well, pretty well all the time I have been chief, the same man.
Q. He was the foreman of the coal trimmers?
A. He was the foreman of the coal trimmers, yes, sir.
Q. How long did they continue to dump this coal into the No. 3 between decks before anything happened?
A. Well, they would get it up into a pile and send the trimmers in.
Q. Did you see the trimmers go down?
A. Yes, sir.
Q. What does a trimmer do?

A. He removes the coal from the heap and throws it as far back as he can until they fill the space up.

Q. The trimmers were down there that morning, were they?

A. They were down there, yes, sir.

Q. And the process of trimming that new coal would put the new coal where, with reference to the old coal pile?

A. Well, it would fill the space up which had been worked out and it would come on to the old coal, of course.

Q. Would there be any new coal in the after end of the No. 3 between decks?

A. Oh, yes, there would be new coal there.

[fol. 392] Q. Would there be any new coal in the forward end?

A. Not right forward, no.

Q. That would be on account of the shape of the pile?

A. Yes, sir, the slant, you see, would come down and the coal would pass that.

Q. Mr. Oxtoby, something happened that morning, didn't it, with respect to the condition of the coal?

A. Well, the foreman came to me——

Q. What foreman are you talking about?

A. The foreman of the coal trimmers, and he said that the coal was hot.

Q. Is that all he said?

A. No, he said it was burning the men's boots.

By the Court:

Q. Which coal was that?

A. He said the coal.

By Mr. Keating:

Q. Did you ask him which coal, or do you recall?

A. I do not recall.

Q. What did you say to him?

Mr. Jones: Objected to, what this witness said to the foreman.

Mr. Keating: I think it is very important that your Honor should have this story.

The Court: I think it is part of the res gestæ and admissible. I overrule the objection, with exception.

Q. What did you say, Mr. Oxtoby?

A. Well, I said, as near as I can recollect, I said the coal would be all right and carry on with it.

Q. How long did that conversation take?

A. Not over two minutes.

[fol. 393] Q. Did you go down in the No. 3 between decks then?

A. Not just at that time, no.

Q. Did you go down later?

A. Yes.

Q. Did you report at the time it happened your conversation with the foreman of the coal trimmers to the captain?

A. No, sir.

Q. To whom did you report it?

A. Nobody.

Q. Why not?

A. Because I thought the coal was quite all right. I had no reason to report to anybody.

Q. When did you expect that all the coal in No. 3 between decks would come out?

A. In about 15 days' time.

Q. You took a chance, didn't you, then?

A. I took a chance—a chance in my opinion the coal was all right and it was quite all right to go home with.

Q. Now, Mr. Oxtoby, do you make a report in writing at the end of each voyage in Hull?

A. A report goes in every voyage.

Q. For each voyage?

A. For each voyage.

Q. Made out by you?

A. Made out by myself.

Q. And to whom does that report go?

A. To the Superintending Engineer.

Q. Who was that?

A. Mr. Brackenbury.

Q. And that is done for each voyage?

A. That is done for each voyage.

Q. Did you hand in a report for the June voyage?

A. Yes, sir.

Mr. Keating: Now, if the Court please, those reports are arriving tomorrow on the "Majestic", and I will furnish them to Mr. Jones. I am sorry they are not here now, but

the chief will be here and Mr. Jones will have an opportunity to see them and question this witness about them.

The Court: All right.

[fol. 394] Q. Did you see Mr. Brackenbury on the ship following the June voyage in Hull?

A. Yes, sir.

Q. Was he there several times?

A. He was there several times, yes, sir.

Q. Do you remember what the occasion was of his coming aboard?

A. He was getting plans for the refrigerating repairs that I am talking about.

Q. He was there a good deal?

A. Oh, yes, he was there on two or three occasions.

Q. Now, Mr. Oxtoby, who is it in the company, the Ellerman's Wilson Line, this English corporation, who is it to whom you, as chief engineer, make your reports?

A. Mr. Brackenbury.

Q. Has he charge of all the engineers?

A. He has charge of all the engineers, of the engineering office.

Q. And you make a report to him how often?

A. At the end of every voyage.

Q. Do you make any report in New York?

A. Yes, I sometimes send a letter home to him from New York.

Q. Do you make a report to anybody in New York?

A. Oh, no.

Q. But you sometimes write him?

A. I think it is a duty of the engineers to write him, and the letter gets home and he knows what work we have had to do, see.

Q. Mr. Oxtoby, at any time while you were chief engineer of this vessel did you receive instructions in writing from Mr. Brackenbury about coal?

A. Yes——

Q. Don't tell us what it is. Have you got the papers that were given to you by Mr. Brackenbury?

A. No, I haven't.

Q. What became of them?

A. They were lost with the ship.

[fol. 395] Q. In New York Harbor?

A. Yes, sir.

Q. I show you, Mr. Oxtoby, a document, and ask you what that is? (Showing witness paper.)

A. That is a letter which I received, sir.

Q. You mean it is a copy of a letter?

A. It is a copy of a letter that I received.

Q. From Mr. Brackenbury?

A. From Mr. Brackenbury.

Q. How did you receive it, through the mail?

A. No, he gave it into my hand.

Q. When?

A. In Hull.

Q. When?

A. November, 1925.

Q. Do you recognize that as a copy?

A. Exactly.

Q. The original you say—what happened to it?

A. That was lost with the ship.

Q. Did you lose anything else?

A. My books and my clothes, everything, practically.

Mr. Keating: I ask that it be marked in evidence.

(It is marked Exhibit G of this date.)

Q. Did you read these instructions?

A. Absolutely, yes.

Q. You had them on board at the time the "Galileo" was lost?

A. Yes, sir.

Q. I call your attention, Mr. Oxtoby, to the concluding paragraph. First of all, this is dated October 19, 1925. "At the end of each year and each succeeding year please send in a statement as to the longest time any coal has been on board at the time of loading and also the amount;" did you do that?

A. No, I didn't do that.

Q. Why not?

A. Because soon after receiving that letter we went up to [fol. 396] Newcastle and we went into the drydock there, and the bunkers were thoroughly repaired and painted and all the coal was moved out of them.

Q. When did that operation finish?

A. That finished in December of the same year, 1925.

Q. And when did you leave on your first trip after those repairs?

A. I think the middle of December that year, after completing those repairs.

Q. And why didn't you send a report in compliance with that?

A. Because I knew that the officer knew, and Mr. Brackenbury knew, that everything had been cleaned out of the bunkers.

Q. Was everything cleaned out of the ship then?

A. Yes, sir.

Q. What did they do?

A. They repaired them where required and painted them up.

Q. And did other repairs to the ship?

A. And did other repairs to the ship, yes, sir.

By the Court:

Q. In New York in August, 1926, was any of the new supply of coal put into the permanent bunkers?

A. Oh, yes, sir; yes, sir.

By Mr. Keating:

Q. Do you know how much coal was loaded in the permanent bunkers here in New York in August, 1926, approximately?

A. Well, if you would give me a little piece of paper I could soon make it out.

(Witness is handed a piece of paper.)

Q. Do you want these exhibits too?

A. No, sir. I think there would be about 470 tons go into the permanent bunkers.

[fol. 397] Q. In August, 1926?

A. Yes, sir.

Q. Was there any other part of the ship, in August, 1926, that you could have removed the 160 tons that remained in the No. 3 between decks to?

A. Was there any other place in the ship?

Q. Yes.

A. Oh, yes.

Q. Where could you have put it?

A. In the shelter deck.
Q. What shelter deck?
A. No. 2 shelter deck.
Q. And where else could you have put it?
A. Well, I don't know; I have nothing to do with cargo or anything like that, but I know that place was clear of any cargo.
Q. Was there anything to stop you putting it in the permanent bunkers?
A. It wouldn't have gone in the permanent bunkers.
Q. I beg pardon?
A. All that coal wouldn't have gone into the permanent bunkers.
Q. I am talking about the old coal.
A. Oh, I beg your pardon; it could have gone into the permanent bunkers.
Q. Why didn't you put it there?
A. I didn't see any necessity for shifting it.
Q. There is a space on these reports for shifting, isn't there, Exhibits E and F?
A. Yes; if I had wanted the coal moved I could have got it moved.
Q. How would you have gone about that?
A. Seen the captain and told him I wanted labor to move the coal.
Q. Have you done that in the past?
A. Yes, yes.
Q. Who was there in New York either on the ship or anywheres else, in August, 1926, that had anything to say about [fol. 398] your bunkers besides you yourself?
A. Nobody, nobody.
Q. How much coal do you burn a day at sea?
A. About 42 ton.
Q. And how long is the ordinary passage from Hull to New York?
A. Well, you can average it, say 15 to 16 days.
Q. Each way?
A. Yes.
Q. Do you burn any coal in port?
A. Oh, yes.
Q. At each end?
A. Yes.
Q. How much coal does your steamer consume in a round voyage?

A. Well, about 1400; between 1400 and 1500 tons.

Q. Now, I observe that on leaving New York on July 2, 1926, according to Exhibit E, you had 1810 tons of bunker coal on board, is that right? (Showing witness paper.)

A. Oh, yes, that is right.

Q. Now, how long would it take you—how many voyages—to completely exhaust that coal if no other coal was taken on board?

A. Well, according to that you see it would take about a little over a voyage, wouldn't it, say burning 1500 ton, a little over a voyage.

Q. Now, when did you expect that all the bunkers in No. 3 between decks would be removed from that space?

A. In the No. 3 between decks?

Q. Yes.

A. We left on the 28th of August, I expected that they would be out before the end of September, in a fortnight's time.

By the Court:

Q. You didn't expect to burn that on the "Galileo", did you?

A. No, sir.

[fol. 399] Cross-examination.

By Mr. Jones:

Q. By whom are you employed now?

A. Beg pardon, sir?

Q. Who are you working for?

A. The Wilson Line.

Q. The same people you were working for at the time this fire occurred?

A. Yes, sir.

Q. When you got home did you tell anybody about this matter of what the stevedores told you here in New York?

A. No.

Q. Did you ever tell anybody before you told us today about it?

A. Beg pardon?

Q. Who was the first person you ever told about it?

A. About——

Q. About what the stevedores told you about their feet being hot when they got on this coal; who was the first person you ever mentioned that to?

A. Mr. Brackenbury.

Q. Who is he?

A. The superintending engineer.

Q. When did you mention it to him?

A. On the voyage over.

Q. What voyage over?

A. From England.

Q. Well, now—is that the same as that Mr. Brackenbury that you have told us about?

A. Yes, sir.

Q. You mentioned it to Mr. Brackenbury on the voyage over?

A. Yes, sir.

Q. Was he on the ship with you?

A. Yes, sir.

Q. What ship?

A. The "Sythia".

Q. The "Sythia"?

A. Yes, sir.

Q. It was shortly after this disaster that you told Mr. Brackenbury about it?

A. No, sir.

Q. I thought you just told me that?

Mr. Keating: No, he said on the voyage to America.

[fol. 400] Q. You never told him about it until this time?

A. No.

Q. You kept that as a deep secret in your own breast up to that time?

A. Yes, sir, I did.

Q. And you felt very guilty about it, didn't you?

A. No.

Q. You feel guilty about it now, don't you?

A. No.

Q. You don't feel that you were grossly negligent?

A. No.

Q. You don't think that had anything to do with the fire?

A. I didn't think that the coal would have got on fire.

Q. Do you think now that your paying no heed to the fact that the coal was hot had anything to do with the fire?

A. No; in my estimation the coal was perfectly all right.

Q. And you don't think today that that had anything to do with the fire, do you?

A. Well, I don't know.

Q. Mr. Brackenbury fired you when you told him about this, did he?

A. No.

Q. He has still got you in his employ?

A. Beg pardon?

Q. (Repeated.) He has still got you in his employ?

A. Yes.

Q. And you never mentioned that fact to a soul until you mentioned it to Mr. Brackenbury while you were coming over from England on the "Sythia" to come here to testify in this case?

A. No.

Q. Do you know that that would be an interesting subject to anybody interested in this case?

A. I hardly get that question.

Q. Did you know that that would be an interesting subject to anybody who has anything to do with this case?

A. Oh, yes, sir.

[fol. 401] Q. And notwithstanding that fact, you kept it secret for three years?

A. Yes, sir.

Q. And never mentioned it to a soul?

A. No.

Q. Didn't you know that it was your duty to report the facts to the people who had a right to know about them?

A. No, I didn't think it was my duty to report anything like that.

Q. What makes you think it was your duty to report it to Mr. Brackenbury on your way over her- to testify in this case?

A. Well, I should have to testify that Magarelli had spoken of it, so I must speak the truth.

Q. Didn't you know that Mr. Brackenbury would want to know what the facts were immediately the thing occurred?

A. Well, certainly, I should have told him.

Q. Why didn't you tell him?

A. Because I thought the coal was all right, and that it was perfectly all right for me to leave New York with it.

Q. Well, you knew that the stevedores didn't agree with you in that opinion?

A. The stevedores?

Q. Yes.

A. I only had two minutes' conversation with him; I didn't know whether he agreed with me or not.

Q. Who were the people that talked to you? Wasn't it trimmers or stevedores, or what?

A. The foreman of the stevedores.

Q. What was his name?

A. Magarelli.

Q. He came to you and told you that the coal was hot to his feet, and you brushed him aside and told him to go about his business, "I have no time to pay attention to you," is that what happened?

A. Yes, sir.

Q. And you kept that secret for a period of three years, [fol. 402] never told Mr. Brackenbury about it, and never told Mr. Keating about it, and never told anyone about it until you got on the steamer to come over here to testify in this case, and you made a confession to Mr. Brackenbury, is that what happened?

A. Yes, sir.

Q. Now, Mr. Oxtoby, I want to be quite certain that I fully understand your position. What you say today is that the heating of the coal didn't have anything to do with the fire?

A. I didn't know what caused the fire.

Q. You don't say anything one way or the other about it?

A. No, I don't know anything about what caused the fire.

Q. But you did think when you came over on the steamer that it was time for you to make a confession to Mr. Brackenbury about what this foreman told you?

A. Yes, I did.

Q. And you had never made any such confession until that time?

A. No.

Q. Now, you have spoken of this American coal as being fine. It has been stipulated in this case between Mr. Keating and myself that it was what we call run of the mine *ocal*?

A. Yes.

Q. You know run of the mine coal consists of fines and large lumps?

A. Yes.

Q. And this coal did consist of fines and large lumps?

A. Yes, there were some lumps.

Q. There were quite considerable large lumps?

A. No.

Q. Did you make any complaint about its being all fines?

A. No, never.

Q. And do you know when you get coal, as a chief engineer, that is all fines, you always make complaints about it, don't you?

A. No, sir.

Q. Do you know what causes heating of coal?

A. Well, the oxygen getting into it.

[fol. 403] Q. Do you know anything about the form of ventilation you should give to coal?

A. Yes.

Q. What?

A. You should give it surface ventilation.

Q. Give it surface ventilation?

A. Yes, sir.

Q. And you know that Lloyds requires that you should have two ventilators, one in the forward part of the compartment and one in the after part of the compartment, to properly ventilate coal, don't you?

A. I know there should be two ventilators.

Q. Was it never called to your attention by Mr. Brackenbury?

A. No.

Q. The Board of Trade circular issued in March, 1907, page 44 of Mr. Stoek's pamphlet, Exhibit 19 in this case, states—I am reading from page 44: "In order to secure adequate surface ventilation at least two ventilators should be provided for each hold or compartment in which coal is stowed. These ventilators should be of wrought iron or wrought steel fitted with cowls and placed at opposite ends of the compartment, or as far apart as circumstances will permit." Do you know of that requirement?

A. Yes, sir.

Q. Do you know anything about that regulation of the Board of Trade?

A. Yes, sir, I have read it.

Q. And you knew that the compartment in which you had to place this coal, which was part of the permanent bunkers of the ship, supplied you by the owners, had no such ventilation?

A. I said they had two ventilators; they had two ventilators.

Q. Are they at opposite ends of the compartment?

A. Opposite ends of the compartment?

Q. Yes.

A. No, they are not.

[fol. 404] Q. And you knew then that the permanent bunker space of this ship was not ventilated—you told Mr. Keating that this was a permanent bunker space?

A. No, sir; no, sir.

Q. I have it in my notes and I took it down very carefully and I will refer to the notes when they are written out. I will put that aside for the moment. We will come back to it later when we get the notes. Mr. Brackenbury knew that you used this compartment for the carriage of coal, didn't he, for he came aboard your ship when you were in Hull?

A. Yes.

Q. He went all over your ship?

A. Yes, sir.

Q. You made reports to him?

A. Yes, but not about the bunker coal.

Q. He saw the places where you carried the coal, didn't he?

A. Yes, sir.

Q. And this compartment did not have ventilation as required by the rules of the Board of Trade, did it?

A. Well, it had two ventilators, but they were not opposite to one another—they were opposite to each other.

Q. But they were not at opposite ends of the compartment, were they?

A. No.

By the Court:

Q. How far were they from the ends?

A. Well, I think 23 feet from the forward end.

Q. What do you mean by the end?

A. The forward bulkhead.

Q. How far were they from the side of the ship?

A. About 8 feet, as near as I can say, from the sides of the ship.

Mr. Keating: The ship was 50 feet wide, sir.

[fol. 405] The Court: Is it your contention that ends mean forward and aft?

Mr. Jones: Yes, sir.

The Court: Not forward of aft?

Mr. Jones: Yes, sir.

Mr. Keating: There is nothing in that, for the compartment was wider than it was long; it was 33 feet long by 50 feet wide, and Mr. Jones is reading from a pamphlet which has been supplemented by the pamphlet of the Board of Trade in 1917.

Mr. Jones: You refused to let me put it in.

Mr. Keating: We are prepared to let this go into evidence.

Mr. Jones: I offer Exhibit 17 for Identification in evidence.

(It is marked Exhibit 17 of this date.)

By Mr. Jones:

Q. The only thing that you ever had called to your attention with respect to the ventilation of coal is that there should be adequate surface ventilation?

A. Yes, sir.

Q. You never had anything else called to your attention?

A. That the air should not have to go through the coal.

Q. You had nothing whatever to do with the bulkhead in that ship?

A. No, sir, not making it.

Q. And you had nothing to do with whether it was air-tight or not—the chief mate, it is his business?

A. He said it was air-tight.

Q. But that is his business?

A. Yes, sir.

[fol. 406] Q. And you have nothing whatever to do with making them air-tight or not making them air-tight, or anything about it, have you?

A. No, I have not.

Q. But you do know that they should be made air-tight?

A. As air-tight as a bulkhead can possibly be made air-tight.

Q. And you know they should be absolutely air-tight, don't you?

A. They couldn't be.

Q. You can caulk a bulkhead?

A. Oh, yes, you could caulk a wood bulkhead, but I don't think you could make it absolutely air-tight.

Q. You don't know?

A. I don't think so.

Q. You don't know, do you?

A. No.

Q. Now, you said the wooden bulkhead in the shelter deck was practically the same as in the between decks; that is correct, isn't it?

A. Yes, sir.

Q. I show you Exhibit 7 and ask you if the planking shown on that exhibit isn't similar to the planking which was used in the between decks, on the bulkhead that was in the between decks?

A. Have you got the exhibit for the between deck bulkhead?

Q. All I have got is—it was burned away—there is only one plank left in one of these pictures, that is all I can show you.

A. Well, the planks were the same, as far as I can remember, the bulkheads were the same.

Q. The planks were similar to those as shown in that picture; I am showing you now Exhibit No. 7?

A. My recollection isn't clear as to what kind the bulkheads were, but I think they were the same.

Q. As shown in the picture No. 7?

A. Yes.

Q. Now I have written down here and I endeavored to take what you said, as nearly as I could get it, and I have [fol. 407] written here, the space aft of wooden bulkhead, part of the permanent bunkers of the ship—do you say that is not so?

The Court: You are mistaken about that, Mr. Jones, I am quite sure. If I am not mistaken, it was when I was asking him.

Mr. Jones: Yes, sir.

The Court: I got the impression from him that the permanent bunkers of the ship were to the rear of this space in the No. 3 between decks, that is my distinct impression; it confirmed my previous impression, and I didn't have the slightest idea that he intended to tell me that the No. 3 between decks was a part of the permanent bunker, that he was distinguishing between that space and that space in the rear.

Mr. Jones: As long as we are all agreed that that isn't so, I can't press it for the moment, but I was very much surprised when I made that note. But we want to look at his testimony and clear up that point, for I think that he agreed that the space in the between decks where the coal was placed was not a part of the permanent bunkers of the ship.

The Witness: No, it was not.

Q. You said you had been on this ship since 1908?

A. Yes, sir.

Q. Had that bulkhead been in that ship ever since you had been on the ship?

A. The after bulkhead had, yes, sir.

[fol. 408] Q. I mean the wooden bulkhead at the forward end of No. 3 between decks?

A. No, I can't tell you that.

Q. You don't know when it was put there?

A. No, I can't tell you.

Q. You don't know?

A. No.

Q. But it had been there for a long time?

A. Possibly, for cargo purposes, or something of that kind, I don't know.

Q. Now, you usually carried grain in your lower hold, didn't you?

A. Yes.

Q. That was the regular trade that your ship was in, to carry grain in these lower holds?

A. Yes, sir.

Q. So any bulkheads which you had in your lower holds were grain-tight?

A. Yes, sir.

Q. And built in accordance with the regulation for bulkheads for carrying grain?

A. Well, that isn't my part of the play, I don't know it.

Q. But you assume it?

A. I assume it.

Q. How do you discharge grain at Hull?

A. Well, it is taken over by bags, the bags are filled, and it is over on the top deck and dumped over the side.

Q. You have no suction elevators?

A. There are some, but it is not usually discharged by them.

Q. You have no lighters that come alongside that are equipped with suction apparatus?

A. No.

Q. In Hull you use the old-fashioned system of hoisting it out of the hold with bags or baskets or some other appliance?

A. Yes, sir.

Q. Do you hoist it out through the feeder or through the square of the hatch?

A. Well, you are asking me something really that I am [fol. 409] not conversant with, because I don't know exactly how it is discharged, but it comes out of the hold through the hatch, I take it.

Q. You have been on the ship for almost 8 years?

A. Yes.

Q. The ship carried grain probably every time she went out of this port, didn't she?

A. She carried a lot of grain.

Q. She was one of the grain carriers?

A. Yes.

Q. And there was not a voyage that she made during those years that she hadn't grain on her?

A. A few.

Q. It would be probably a few voyages that she didn't have grain?

A. Very few.

Q. And you never paid any attention to how they discharged that grain?

A. Only through the hatchways.

Q. Isn't it a fact that you used no coal out of the between decks or the shelter deck on any of your voyages either in June or in August, 1926?

A. We used the coal out of the shelter deck, so much of it, and so much out of the between decks in June, 1926.

Q. Which voyage?

A. After we left here in June.

Q. Now, will you just tell us what is the practical method you used in firing your ship? You have what you call side bunkers, haven't you?

A. Yes, sir.

Q. And you have stokers?

A. Yes, sir.

Q. And you have coal passers?

A. Yes, sir.

Q. Tell us what happens. Does the coal passer go through the bunker to get coal and pass it to the stoker, and the stoker passes it into the furnace?

A. Yes, sir.

Q. Where does he get it from?

A. At whatever hold we are working from.

[fol. 410] Q. If it is in the shelter deck does the coal passer go up to the shelter deck and fill a wheelbarrow full of coal and wheel it to some hatch and dump it down?

A. Yes.

Q. Notwithstanding he has coal in the side pocket just by his hand?

A. Whichever bunker we are working from he dumps it from that into the nearest place he can come to the stoke-hole.

Q. Don't you know that you work your side bunkers first?

A. No, not always.

Q. Didn't you on this June voyage?

A. Didn't we work the side bunkers?

Q. Yes.

A. We worked the shelter deck too.

Q. When did you work the shelter deck?

A. That I can't say; some part of the voyage.

Q. Have you logbook?

A. No, I haven't.

Q. What became of your logbook?

A. It was lost with the ship.

Q. Your smooth log as well as your rough log?

A. Everything.

Q. Your logbook would show which bunkers you worked, wouldn't it?

A. Well, I don't think it would, not particularly, which we are working; no, it wouldn't.

Q. Don't you put down which bunkers you are working?

A. No.

Q. How could you get the coal from the shelter deck to the fire room without going through the permanent bunkers?

A. Well, there was a hatch situated right over the chute and the chute was in the athwartship bunker and it would drop through the chute right into the stokehole.

Q. On the floor of the stokehole?

A. Yes.

Q. In front of where the men were working?

A. Yes, sir.

Q. Right in front of the boilers?

A. Yes, sir, on the stokehole place.

[fol. 411] Q. What is the distance between the fire room bulkhead and the boilers?

A. I should think 8 feet.

Q. And you say you dumped the coal right down that 8 feet?

A. No, the chute came level with the bulkhead and you would fill the chute up and it would gradually run down as the fireman wanted it to go.

Q. Where was that chute?

A. In the athwartship bulkhead, lower bulkhead.

Q. Athwartship lower bulkhead?

A. Athwartship lower bulkhead.

Q. So I am right in saying that the chute emptied itself into the bunker?

A. It was entirely separate from the bunker, was the chute, a built casing inside the athwartship bulkhead.

Q. It was inside the athwartship bunker?

A. Yes.

Q. And that bunker is down in the bottom of the ship?

A. Yes, sir.

Q. So I am right in saying that in order to get the coal from the shelter deck to the fire room you have to dump it into the chute, which empties it into the fire room?

A. Yes, sir. The between deck bunkers, you have to let

it go so far down and the top of the chute will be bare, and you can put the coal down.

Q. I show you Exhibit No. 17 and ask you if that paper was ever called to your attention by Mr. Brackenbury?

A. Yes, sir.

Q. Now, you told I think either the Court or Mr. Keating, that you expected the coal would be out of the between decks in a fortnight, that is the coal that you took away in August?

A. Yes.

Q. You knew that that coal was being taken over for the [fol. 412] use of one of the other steamers, didn't you?

A. Yes, sir.

Q. And you knew that wouldn't be used by the "Galileo" at all?

A. No, we shouldn't use that coal.

Q. And that all of the coal that was in the No. 3 between decks and in the No. 3 shelter decks, which was on the "Galileo" when she left New York August 28, 1926, was there not for use on the "Galileo" at all, that is right?

A. I understood so; there was plenty of other coal.

Q. And that coal was for the use of another steamship?

A. Yes, sir.

Q. And you never intended to use it, nor did anyone on your ship intend to use it?

A. No, sir.

Q. That was pursuant to instructions which you received from your owners?

A. Yes, sir.

Q. The coal which was supplied you here you knew was supplied by your shore agents?

A. Yes, sir, the Morrisdale Coal Company.

Q. And it was ordered by Ellerman's Wilson Line, Inc., New York?

A. Yes, sir.

Q. And if you thought that that was improper coal, the second lot you got, you would certainly have reported it to somebody?

A. I hardly get you.

Q. If you thought that that coal was poor coal which your Ellerman's Wilson, Inc. had bought——

A. Yes.

Q. And the people who supplied it were cheating your owner, you would have said something about it, wouldn't you?

A. That was my duty, yes, sir.

[fol. 413] Direct examination.

By Mr. Keating:

Q. Mr. Oxtoby, when did you first confess to me that the story about Magarelli was true?

A. When I arrived in New York.

Q. You had previously denied to me that it was true, hadn't you?

A. That is right.

Q. And I told you that you had to come into court and tell the truth, didn't I?

A. Yes, sir.

Q. And I took an affidavit when you were in my office?

A. Yes, sir.

Q. Now, what else did you tell me? You told me this was on your conscience, didn't you?

A. Yes, sir.

Q. How many times prior to October, 1929, when you made this affidavit which I am going to ask to have marked in evidence, had you told me the Magarelli story was false?

A. I couldn't tell you.

Q. Many times, wasn't it?

A. Several times, yes, sir.

Q. And you came into my office on October 29th with Mr. Brackenbury?

A. Yes, sir.

Q. And you told me that you had lied to me?

A. Yes, sir.

Q. And I told you you would have to come before this Court and tell the truth, didn't I?

A. Yes, sir.

Q. And before your God, Mr. Oxtoby, is this story about Magarelli true or is it not true?

A. It is true.

Mr. Keating: I ask to have the affidavit made to me on October 29th marked as an exhibit in this case.

Mr. Jones: I object to that, if your Honor please; we have this man's testimony.

[fol. 414] Mr. Keating: I want it very clear what this story is.

The Court: How do you justify this offer?

Mr. Keating: Mr. Jones has suggested perhaps that this story about Magarelli is made up. It is a painful thing for me to state what happened, but the first I knew about the story was on August 29th, before the trial——

Mr. Jones: You know me too well to think that I could suggest any such thing about you, Mr. Keating.

The Court: I don't see how this affidavit could in any way verify Mr. Jones' contention in reference to anyone other than yourself, and he makes no such suggestion as to you.

Mr. Jones: No, I never made any such suggestion.

The Court: I sustain the objection with exception. It may be marked for identification.

(The affidavit is marked for Identification, Exhibit H of this date.)

By Mr. Keating:

Q. Had Mr. Brackenbury in England asked you whether this story of Magarelli was true?

A. Yes, sir.

Q. And what did you say to him?

A. I said it was not true.

Q. When did you first admit, Mr. Oxtoby, that the story was true?

A. As I have testified, when we were coming across from England.

[fol. 415] Q. How did you come to make the confession then, after lying about it all these years?

A. Well, I knew something would have to come out.

Q. You knew you had to go on this stand under oath?

A. That is right.

Q. That is what was on your mind, wasn't it?

A. Yes.

Recross-examination.

By Mr. Jones:

Q. When did Mr. Brackenbury first ask you about this story?

A. He didn't ask me about it; I told him about it.

Q. Well, as I understood you when I was questioning you, you told me that the first time you told him anything about it was when you were coming over here to testify in this case?

A. I confessed then that Magarelli had made the statement, but previous to that he had asked me on several occasions whether Magarelli's story was true.

Q. When did he first ask you in Hull, whether Magarelli's statement was true?

A. I can't tell you.

Q. Was it shortly after this disaster?

A. No. I can't remember when he asked me.

Q. And you haven't been fired by Mr. Brackenbury today, after you have confessed today to a lie and what you no doubt will concede was gross negligence—you haven't been fired by Mr. Brackenbury yet?

A. Well, we are on the case. I don't know what will happen to me afterwards.

Q. And because you are a witness in the case he is not firing you?

A. I can't tell you.

[fol. 416] Gus Magarelli, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Keating:

Q. Mr. Magarelli, what is your business?

A. Longshoreman.

Q. A little louder.

A. Longshoreman.

Q. How long have you been a longshoreman?

A. 17 years.

Q. For whom do you work?

A. F. Jarka & Company.

Q. And are they contracting stevedores?

A. Yes, sir.

Q. Are you a laborer or a foreman?

A. A foreman.

Q. How long have you been a foreman?

A. For 7 years.

Q. And are you a foreman of some particular kind of stevedores?

A. I got only the coal end of it.

Q. You are a foreman of coal trimmers?

A. The coal trimmers.

Q. Mr. Magarelli, do you remember a ship called the "Galileo"?

A. Yes, sir.

Q. Do you recall having been aboard of her in August, 1926?

A. Yes, sir.

Q. What were you doing on board at that time?

A. Unload the coal in the ship.

Q. Do you remember the coal that was put in No. 3 between decks and No. 3 shelter deck?

A. Yes, sir.

Q. Were you there when that was being done?

A. I was there, yes, sir.

Q. Did your men trim any of the coal in the No. 3 between decks?

A. Yes, sir.

Q. How many men did you send down into that space?

A. Eight.

[fol. 417] Q. And was that in the morning or in the afternoon?

A. That was in the morning.

Q. Did you go down with them at first?

A. No.

Q. Now, in the course of the morning something happened?

A. Yes, sir.

Q. What was it?

A. There was a man that trimmed the coal—eight men, I have, that trimmed the coal in the between decks, and so they started to kick and holler, it was too warm down there, and so one of the head men on that gang come up on deck and told me, he says, "Those men down below they can't work no more, one of my men fell out, he get sick."

Q. Did he say anything else?

A. He says, "The coal, it is too warm."

Q. What did you do then?
A. So I went down in the hatch myself.
Q. And where did you go when you went down?
A. In the between decks.
Q. No. 3?
A. No. 3, yes.
Q. And what did you do when you got down there?
A. When I got down there I felt the coal.
Q. Will you describe what the coal felt like? Did you put your hand on it?
A. Yes, I did.
Q. All right; tell the Court exactly what happened.
A. Well, I came down myself and I see it was so warm below and I felt the coal, and when I felt the coal the coal was warm.
Q. How warm was it?
A. I can't say how warm it was, but it was warm so that all the men could stay there only 10 or 15 minutes to work.
Q. Why couldn't they stay longer?
A. Because the coal was too warm.
Q. What did you do?
[fol. 418] A. Well, I told my men to work 10 or 15 minutes each, 4 and 4, 15 minutes to work and 15 minutes to stay in the air.
Q. Did you come up on deck?
A. Yes.
Q. Did you see anybody on deck?
A. I saw the chief engineer.
Q. That is the man who has just testified?
A. Yes, sir.
Q. Did you have any conversation with him?
A. Yes.
Q. What did you say to him?
A. I says, "Chief, my men be kicking there down below, it is warm, and they can't stay down below." He says, "What is the matter?" I says, "The coal is very hot."
Q. And what did he say?
A. Well, he don't pay no attention to me, just said the coal was all right.
Q. He said the coal he used was all right?
A. Yes.
Q. How long did that conversation take?
A. About two minutes.

Q. And then they went on loading the coal?

A. Yes.

Q. Did the chief stand around there when they were loading?

A. He would stay there for a while and then he would go away.

Q. And when did he first tell you that story, Mr. Magarelli?

A. I can't remember, about a year ago, something like that.

Cross-examination.

By Mr. Jones:

Q. When you were speaking about the hold being warm, which lot of coal are you talking about, the coal that was already there or the coal that you were going to put in?

A. The coal that were in.

[fol. 419] Q. You mean the coal that was there before?

A. Yes.

Q. Was there any smoke you could see or gas you could smell?

A. I could smell the gas over the side, there was gas come on the coal boat.

Q. Now, on which side of No. 3 between decks was the coal, the hoister, could you form any opinion?

A. Well, that was about the middle of the hatch, it was on my right, my right side.

Q. Your right side. If you were standing looking forward toward the bow of the ship your right side would be the bow of the ship?

A. Yes, sir.

Q. If you were standing looking back toward the stern of the ship your right side would be the stern of the ship. Which way were you looking, toward the bow or the stern when you say your right side?

A. The bow.

Q. So when you say on the right side, you mean on the starboard side of the ship as well as your right side?

A. That is right.

Q. Now, was this heated coal in the forward or the after end of the compartment?

A. Was it what?

Q. (Repeated.) Was this heated coal in the forward or the after end of the compartment?

A. Well, it was right in the middle.

Q. You are employed by a man named Jarka?

A. Yes.

Q. And he is employed by whom to do this work?

A. By Ellerman's Wilson Line.

Q. Did you make any report to Mr. Jarka about this?

A. No, sir.

Q. Did you make any report to anybody on the dock about it?

A. Nobody but the chief engineer.

Q. You never said anything to the captain about it?

A. No.

[fol. 420] Q. How soon after this ship got afire and came back here and was beached in the Hudson River, and everybody saw it in the Hudson River, and there were pictures in the paper, and everybody was talking about it, there was quite a commotion——

A. Yes, sir.

Q. How soon after that did you tell anybody about the coal being hot?

A. The first time that I went to the law office when he called me.

Q. How soon after the occurrence did you tell anybody about it?

A. I can't remember certainly the month or the day of the year.

Q. Was it a year after the disaster?

A. No, two or three months afterwards.

Q. Two or three months afterwards was the first time you said anything to anybody about it?

A. Yes, sir.

Q. To whom did you mention it?

A. I don't know.

Q. Did you go over to the Ellerman's Wilson Line and tell anybody about it?

A. No.

Q. Did you tell Mr. Jarka?

A. He called me and asked me if I knew anything about the coal, and I told him, he called me to the office.

Q. Which office?

—. The law office.

Q. When did you first mention it to Mr. Jarka?

A. When he seen me.

Q. When did you tell him that?

A. After two or three months.

Q. What was the first time you mentioned it to anybody, two or three months?

A. Yes, sir; he took me——

Q. Took you to Ellerman's Wilson Line's office two or three months after that?

A. Yes, sir.

Q. And then you told them all about it?

A. Then I told them all about it.

[fol. 421] Q. Who was there in the Ellerman's Wilson Line's office when Mr. Jarka took you there on the first occasion that you talked about this coal, who was there? What gentleman was there that you talked to?

A. There were two or three fellows there in the main office, that Mr. Georgie.

Q. Mr. Georgie?

A. Yes, that is all the name I know.

Q. You don't know his last name?

A. I know Mr. Georgie very good, but I don't know anybody else.

Q. Is that his first name or his last name?

A. I don't know.

Q. But everybody knew Mr. Georgie?

A. Yes, sir.

Q. Can you describe him to us? What was his appearance?

A. He was one of the head men in the office.

By Mr. Keating:

Q. And they brought you over to my office, did they, Mr. Magarelli?

A. Yes.

By Mr. Jones:

Q. Now you tell me and tell Mr. Keating that it was a year ago when you first went over to Mr. Keating?

A. Well, I don't know which day or which year, because I don't take care of this business.

Q. I only want to know what the actual facts are, that is the reason I am asking you these questions. You told me that two months after this catastrophe——

A. Two or three months.

Q. Well, give it as much latitude as you wish, two or [fol. 422] three months after the catastrophe, you went and told Mr. Jarka——

A. He came to see me on the pier and asked me the story of how they put the coal in.

Q. So Mr. Jarka came to see you?

A. Yes.

Q. And you and Mr. Jarka went to see Mr. Georgie, who is in Ellerman's Wilson Line's office here in New York?

A. Yes.

Q. That was two or three months after the fire?

A. Yes, sir.

Q. Now, I understood you to say that you first told Mr. Keating about it and that you told me the same thing, about a year ago, and now you say you went over to see Mr. Keating at the time you went to the Ellerman's Wilson Line office?

A. At the same time, yes.

JOHN H. NEALE, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Keating:

Q. Mr. Neale, what is your position in life?

A. Vice-President and Director of Ellerman's Wilson Line of New York, Inc.

Q. How many years have you been employed by the Ellerman's Wilson Line of New York, Inc.?

A. Since it was in session, April 21, 1921.

Q. Are they incorporated under any law of one of our states?

A. Yes, sir, Maryland.

Q. It is a Maryland corporation?

A. Yes, sir.

Q. And what is their relation to the Ellerman's Wilson Line of Hull?

A. New York agent, attending to the vending of cargoes, the collection of freights, supplying stores, and so forth. [fol. 423] Q. Who owns the stock of Ellerman's Wilson Line of New York, Inc.?

A. Ellerman's Wilson Line, Ltd., of Hull.

Q. You are their New York agent?

A. Yes, sir.

Q. Do you know a concern called the Ellerman-Buckner Steamship Company, Ltd.?

A. I know there is a concern of that name, yes, sir.

Q. Has Ellerman's Wilson Line, New York, Inc., any connection with that company?

A. No, sir, none whatsoever.

Q. Do you know who the agents are in New York of Ellerman & Buckner Company?

A. Norton Lilly & Company.

Q. Have you any connection with Norton Lilly & Company?

A. No, sir.

Q. Have they any connection with you?

A. No, sir.

Q. Has Ellerman & Buckner Company anything to do with the Ellerman's Wilson Line, New York, Inc.?

A. No, sir.

Q. Have you anything to do with the Ellerman & Buckner Steamship Company?

A. No, sir.

Q. Will you describe, Mr. Neale, just what the duties of the Ellerman's Wilson Line, New York, Inc., are with reference to your agency?

A. Well, we get a cable that a steamship has sailed, and we make preparation for the berthing of the steamer and advertising in the papers, and endeavor to book all the cargo we can for her and get it alongside of the steamer.

Q. You engage the freight?

A. Yes, sir.

Q. Do you engage the freight?

A. Yes, sir.

Q. Who issues the bills of lading?

A. We do.

Q. Who makes up the manifest?

A. We do.

Q. They are made up in the New York office?

A. In the New York office.

[fol. 424] Q. Who orders the ordinary ship's stores?

A. The chief steward orders them.

Q. Do you have anything to do with that?

A. All we do is to check the bills against the signature of the chief steward and the master, and pay the bills.

Q. You don't actually order the stores yourself?

A. No.

Q. Now, prior to June, 1926, what were your duties with respect to bunkers for the steamers?

A. Prior to June, 1921?

Q. If the steamer required any coal in New York did you have any duties with respect to that?

A. Oh, we measure the space and see if he had coal enough, and if he hadn't, he would report to the captain that he needed so many tons of coal, and those orders would be transmitted to us by telephone, and we would communicate with the coal people and they would put it alongside of the ship.

Q. Was it any part of your duty to tell how many tons of coal was required?

A. No, sir, not for the ordinary run.

Q. Did you have anything to do where the captain and the chief engineer put the coal on board the ship?

A. No, sir.

Q. Now, Mr. Neale, I show you Exhibits C and D, and ask you to tell me whose initials are on those two cables?

A. E. L. S. Sanderson.

Q. What was Mr. Sanderson's connection with the Ellerman's Wilson Line, New York, Inc.?

A. He was the president.

Q. Is Mr. Sanderson alive?

A. No, sir.

Q. Do you know when he died?

A. He died September 9, 1927.

Q. Now, you were ordered to take this extra coal for [fol. 425] transfer according to this cable for the "Francisca"?

A. Yes, sir.

Q. It has been testified that Mr. Sanderson dealt with that with the captain; you know nothing about it yourself, do you?

A. No, sir.

Q. Does your New York office have anything to do with the shipping of coal when it is required?

A. No, sir, except pay the bill of the stevedore when it is rendered.

Q. Who decides that?

A. The chief engineer.

Q. He has authority to require the shipping?

A. No; he reports to the captain that he requires so much coal to be shipped, and they arrange that the stevedores shall do the job.

Q. Does the New York office give any instructions on the matter?

A. No, sir.

Q. Now suppose some repairs are required on the steamer at this port, how is that matter dealt with?

A. If it is hull repairs, the captain, upon his arrival, reports to the pier superintendent that he requires a man to come down and see him, and if it is engine room repairs, the engineer asks the captain to arrange that the man will come down who takes care of the engine repairs.

Q. Does the New York office have anything to do with the engine repairs?

A. No, sir.

Q. What do you do in that case?

A. We simply pay the bill against their signature.

Q. Do the owners of the "Galileo"—have they a marine superintendent in New York?

A. No, sir.

Q. Have they a superintending engineer in New York?

A. No, sir.

Q. Who is in charge of the pier?

A. Their superintendent.

Q. What is his name?

A. H. J. Hicks.

Q. Has he any authority over the officers of the various ships?

A. None whatsoever.

[fol. 426] Q. He lays out the cargo for these vessels, you engage it?

A. We engage the freight and make up a list showing what cargo is engaged, and that is sent over to the pier superintendent, and upon receipt by him, he goes on board the ship and consults with the master and chief officer as to where the cargo should be loaded.

Q. Mr. Hicks is employed by the New York agency?

A. Yes, sir.

Q. Has he any authority to order the master or chief engineer to put some particular cargo in a particular place on the ship?

A. No, sir.

Q. Is there a cargo plan prepared for the cargo that goes aboard a ship?

A. Yes, sir.

Q. That was done for the "Galileo"?

A. Yes, sir.

Q. Who prepares that plan?

A. A clerk on the pier.

Q. Do you know his name?

A. Muller.

Q. Do you know a man—there was some suggestion here the other day about a man named Isbister; do you know a man by that name?

A. Yes, I know Captain Isbister.

Q. Has he any connection with your company?

A. No.

Q. Has he any connection with Ellerman's Wilson Line, Ltd., of Hull?

A. No.

Q. Do you know a man named Nevins?

A. I know a man named Nevins.

Q. Is he connected with your company in any way?

A. No, sir.

Q. Is he connected with the Ellerman's Wilson Line, Ltd., Hull?

A. No.

Q. Has he anything to do with your ships?

A. Nothing.

Q. Have you ever been a ship master?

A. No, sir.

[fol. 427] Q. Marine engineer?

A. No, sir.

Q. Has Mr. Georgie ever been a ship master or ship engineer?

A. No, sir.

Q. Have you any technical people in the New York office?

A. No.

Q. What do you know about coal?

A. Nothing, except that it is needed for a ship.

Q. You are not a coal expert?

A. No, sir.

Q. Do you know whether the late Mr. Sanderson was a technical man?

A. He was not.

Q. He was a business man, was he not?

A. Yes, sir.

Q. Now, do you make a report to Hull on each voyage?

A. Yes, sir.

Q. Do you make an agent's report?

A. An agent's report.

Q. Tell us what that report consists of?

A. It gives the arrival of the steamer at the pier.

Q. It is a written report?

A. A written report showing all particulars as to the arrival of the ship here, and we sent it to Hull, and it shows the gross earnings of the voyage.

Q. Now, besides that agent's report what else do you send?

A. We send a complete manifest, a stowage plan, and dock sheets.

By the Court:

Q. From what information is the stowage plan made out?

A. The cargo sheets which are made up on the pier. As each shipment is delivered it is delivered with a dock receipt, and the dock clerk gives the number and writes it on the dock sheet and the measurement is estimated what each particular consignment amounts to, both as to weight and measurement.

[fol. 428] Q. Well, who fixes the place in the ship that a certain shipment will occupy?

A. All the stowage is arranged by the captain and chief officer with the assistance of Mr. Hicks, who shows them what cargo is engaged.

Q. He shows what cargo is engaged?

A. Yes, sir, he gets a new list every day.

Q. And they determine where they will put it and tell him?

A. That is it.

By Mr. Keating:

Q. Now, Mr. Neale, I show you what appears to be a copy of the agent's report for voyage 106, which is the voyage from New York of July 2, 1926, which I have been calling the June voyage.

Mr. Keating: I would like to say to Mr. Jones in this connection that the original of this report, which I think Mr. Jones is entitled to, is on the way here and will be here before the trial is ended; I had a cable this morning to that effect. I would like to have this go in temporarily, with the understanding that the other actual original as signed will be produced.

Q. As far as you know, is that a copy of the voyage report which was made for what I call the June voyage? (Handing witness paper.)

A. Yes, sir.

Q. The original of that will be signed by whom?

A. By the president.

Q. By Mr. Sanderson?

A. Yes.

Mr. Keating: I ask that this be marked in evidence.

(It is marked Exhibit I of this date.)

[fol. 429] Q. Now, this agent's report for June, Exhibit I, was mailed when?

A. It was mailed the first mail after the steamer sailed.

Q. Do you send it with an accompanying letter?

A. No, sir.

Q. Just send the report?

A. It is shown on here that it is for Hull, and it is sent with our stamp.

Q. And together with this you send the cargo plan?

A. One or some.

Q. Do you send one or some?
A. Three copies.
Q. Of the cargo plan?
A. Yes, sir.
Q. It went with this report?
A. In the same mail.
Q. Did you send a copy of the manifest?
A. A copy of the manifest is always sent in the first mail after the steamer sails.
Q. Is this a copy of what I would call the June voyage manifest?
A. Yes, sir, the final copy.

Mr. Keating: I ask that it be marked.

(It is marked Exhibit J of this date.)

Q. Now, in addition to the manifest do you also send what you have described as the pier sheets?
A. Yes, sir, the cargo sheets; they are given to the chief officer.
Q. They are not sent to the owners?
A. No, he takes them with him together with a copy of the stowage plan.
Q. On board the ship?
A. On board the ship.
Q. And those are what?
A. The cargo sheets—dock sheets.
Q. Now, I observe in looking at the June manifest that [fol. 430] there is nothing said thereon about bunker coal. Do you include bunker coal in the ship's manifest?
A. No, sir.
Q. How is that carried?
A. Bunker coal is reported on the ship's stores when the vessel clears in the Custom House.
Q. It doesn't appear on the regular, the ship's manifest? It appears as ship's stores?
A. Yes, sir.
Q. Ship's stores is the technical name?
A. Yes, sir.
Q. Now, I show you what purports to be a copy of the agent's report for voyage 107, "Galileo", leaving New York August 28, 1926, and ask you whether, as far as you know, that is a copy of the agent's report for that voyage?

A. Yes, sir.

Mr. Keating: I ask that it be marked in evidence.

(It is marked Exhibit K of this date.)

Q. Is there any accompanying letter with Exhibit K?
A. No, sir.
Q. You just send them the report?
A. That is all.
Q. Now, together with that report did you also send them a copy of the ship's manifest for the August voyage?
A. I don't think that they were sent out.
Q. You don't believe that you sent that one?
A. No.
Q. Why was that?
A. Because the steamer returned and it was lost, the papers would be required here by the cargo adjusters.
Q. The average adjusters?
A. The average adjusters.

[fol. 431] Mr. Keating: I ask that this manifest be placed in evidence.

(It is marked Exhibit L of this date.)

Recess until 2:15 P. M.

Met pursuant to adjournment at 2:15 P. M.
Present: As before.

JOHN H. NEALE resumed the stand.

Direct examination.

By Mr. Keating (continued):

Q. Mr. Neale, I show you Exhibit K, which is the agent's report for the "Galileo" August voyage. Was that report sent to Hull to the owners before or after the ship sailed?
A. These reports are always sent by the first mail steamer after the steamer sails; they cannot be completed until the steamer's manifests are completed, for they haven't the earnings for the east voyage.
Q. You haven't the coal either, have you?
A. No.

Q. I show you Exhibits E and F, which are the chief engineer's coal reports. Do those come into the New York office?

A. Yes, sir.

Q. When do they come in, before or after the steamer sails?

A. After the steamer has sailed.

Q. Is that the first time you see them?

A. Yes, sir.

Q. Do you get any other report than that for the coal?

A. No, sir.

Q. What do you keep them for, what do you do with them?

A. We use them for checking purposes on the coal bills, [fol. 432] and filling in these reports.

Q. For any other purpose?

A. That is about all.

Cross-examination.

By Mr. Jones:

Q. Mr. Neale, I assume from your answer to one of the questions put to you by Mr. Keating that the Ellerman's Wilson Line, New York, Inc., was a corporation whose stock was owned altogether by Ellerman's Wilson Line, Ltd., Hull. That is right, is it?

A. That is right.

Q. In other words, Ellerman's Wilson Line, New York, Inc., is a corporation which is simply a subsidiary of the Ellerman's Wilson Line, Ltd., Hull; that is correct, is it?

A. Yes, I think it is.

Q. Now, you stated, as I remember it, that you booked cargoes for the ships of the Ellerman's Wilson Line?

A. Yes, sir.

Q. I assume you followed the usual practice in booking cargo for a named vessel?

A. Yes, sir.

Q. And that cargo is booked to a certain considerable extent before the ship arrives, for you have order for a ship coming in, you book cargo for that ship before she gets here?

A. That is right.

Q. And in doing that you of course keep in mind the capacity of the ship and how much she can carry; that is true, isn't it?

A. That is right.

Q. So you book them as full as you can get them, for you want to get as much freight on your ships as you can?

A. That is correct.

Q. And you did that for the "Galileo", didn't you?

A. Yes.

Q. And you have someone in your organization who goes [fol. 433] over the ship's plan with a view to ascertaining how much you can carry too, don't you?

A. That is right.

Q. And you fill in every available space you can with cargo?

A. That is right.

Q. And in booking your cargo you keep in mind that you must have a certain amount of heavy cargo and a certain amount of light cargo if you are going to fill her up, don't you?

A. Well, we have to take what we can get.

Q. But you have that in mind, what we call both weight and measurement cargo?

A. Yes.

Q. Now, with the "Galileo" had you booked this cargo before she arrived?

A. I wouldn't say all of it.

Q. But most of it?

A. A good portion of it, probably, the grain undoubtedly.

Q. I show you a bill of lading and ask you if you can tell me what that bill of lading is?

A. Yes, it is a bill of lading covering the shipment of 8 pieces of plates.

Q. On the "Galileo"?

A. On the "Galileo".

Q. And by whom is it signed?

A. The bill of lading clerk, W. J. Chatfield.

Q. Signed pursuant to instructions given him by Ellerman's Wilson Line, New York, Inc.?

A. Yes.

Q. As agent for the Ellerman's Wilson Line, Ltd., Hull?

A. Yes, sir.

Mr. Jones: I offer it in evidence.

(It is marked Exhibit 22 of this date.)

Mr. Jones: I also offer in evidence on the consent of Mr. Keating an invoice of the United States Steel Products Company, covering 8 pieces of steel mentioned in the bill [fol. 434] of lading, and the steel is described as 8 pieces tank steel plate, 8 inches by 1½, 59 feet 3 inches long.

(It is marked Exhibit No. 23 of this date.)

The Court. Were these only 8 pieces of steel 8 inches wide in the whole of the shelter deck No. 2?

Mr. Keating: Yes, so far as I know.

The Court: It would take up a very small space.

Mr. Keating: Very; they were only 8 inches by 1½ inches.

The Court: Long steel rods?

Mr. Jones: They call them tank steel plates.

The Court: Have you got any information as to there being other cargo in the No. 2?

Mr. Jones: All I have, if your Honor please, is the stowage plan; that all appears on the stowage plan.

Mr. Keating: The report of the agent shows that there were 103,000 cubic feet of vacant space on this steamer when she left New York, sir.

The Court: Well, that isn't very big; this shelter deck space must have been much larger than that.

Q. Who hired Jarka, the stevedore?

A. When there is any work about that the bids are given out by contracts.

Q. Who gives out the bids?

A. We do, and the one who submits the most attractive [fol. 435] bid gets the contract.

Q. Who buys the coal for Ellerman's Wilson Line ships?

A. We pay for it.

Q. Who orders it?

A. I usually do.

Q. Do you put that out to bids too?

A. At that time we were using Morrisdale coal; we had been using it for years, and I suppose——

Q. So you determine the kind of coal?

A. Oh, no, we don't determine the kind of coal.

Q. Who determines it?
A. The contractor.
Q. Who made the contract?
A. Mr. Sanderson.
Q. That is Ellerman's Wilson Line?
A. Yes, sir.
Q. And those contracts you have approved by your Ellerman's Wilson Line at Hull, before you finally enter into them, don't you?
A. I believe they do, yes.
Q. Now, isn't it true also that with respect to the "Galileo" on the August voyage that you ordered the coal pursuant to instructions which you received from Hull by cable?
A. Yes.
Q. That is Exhibits C and D in this case?
A. The additional coal.
Q. You ordered that pursuant to direct instructions from the owner?
A. That is right, notifying the captain of the cable.
Q. Now, when it becomes necessary to repair ships of the Ellerman's Wilson Line at New York who, in your organization, has anything to do with those repairs?
A. Nobody in the organization. The captain is the one who decides whether he requires something to be repaired.
Q. Do you mean to say that you have no one outside of the ship's company whose duty it is to look over your ships to ascertain whether or not they need repairs?
[fol. 436] A. No, sir, and I can tell you why. The ships are traveling back and forth from the home port, and they are home every few weeks, and we don't require anyone on our side, for that reason.
Q. When it does become necessary to repair them here, do you ever have anyone from the outside to look at them?
A. No, sir.
Q. No independent surveyor at all?
A. No, sir.
Q. Suppose you have what we call a damage case, do you have anyone outside to look at it then?
A. Then we would call the company in which the steamer is insured; it would be Lloyds or whoever it might be.
Q. Don't you have anyone but the surveyor to look at the ship?

A. I can't say that we do.

Q. Do you call anyone representing your company to look at the ship?

A. If a master requires a repair we consider he knows what the ship needs and we leave it to his jurisdiction.

Q. And you don't have anyone to look at the situation?

A. No, sir.

Q. Or to check up on the engineer?

A. No, sir, we take their signatures on the bill.

Q. Do you know whether or not Mr. Sanderson was aboard the "Galileo" before she sailed in August, 1926?

A. No, sir, I couldn't tell you.

Q. You don't know?

A. I don't know.

Q. Are you president or vice-president or secretary or treasurer of the Ellerman's Wilson Line, New York, Inc.?

A. At the present time?

Q. Yes.

A. I am vice-president.

Q. What was your position with the same line at the time of the disaster?

A. A departmental head.

Q. What is the capital of Ellerman's Wilson Line, New [fol. 437] York, Inc.?

A. I think it is a hundred thousand dollars.

Q. And all of the shares of the stock are owned by Ellerman's Wilson Line, Ltd., Hull?

A. That is right.

Q. Who was the president in August, 1926?

A. Mr. Sanderson, E. Lloyd Sanderson.

Q. And who was the vice-president?

A. Mr. Charles H. Georgi.

Q. How do you spell it?

A. G-e-o-r-g-i.

Q. And who was the secretary?

A. I think I was in—1926—no, I think I am giving you wrong information, I think in 1926 the president was E. Lloyd Sanderson, that was in November, and the secretary was Charles H. Georgi.

Q. And who was the treasurer?

A. Edmund A. Collins.

Q. And who were the directors?

A. Lloyd Bowen Sanderson, E. Lloyd Sanderson, Charles H. Georgi, Everett Masten, and Frank A. Bull.

Q. How was Ellerman's Wilson Line, New York, Inc. paid for their service?

A. Why, we received a commission on the manifest, a percentage, 4 per cent outward and 20 per cent inward.

Q. What arrangement did they have for office space?

A. Well, we had offices at 26 Broadway.

Q. And did the Ellerman's Wilson Line, New York, Inc. pay the rent for those offices?

A. Yes, sir.

Q. Did they occupy the offices with Sanderson & Son?

A. No, sir.

Q. It was a separate and distinct corporation?

A. It was a separate and distinct corporation.

Q. And they had separate and distinct offices for which they paid rent?

A. Yes, sir.

Q. Did you have a corps of bookkeepers and accountants in your office?

A. Yes, sir.

[fol. 438] Q. Which Ellerman's Wilson Line, New York, Inc. paid?

A. Yes.

Q. Did you have correspondence either by letter or by cable with Ellerman's Wilson Line, Ltd., Hull, with respect to booking cargo for the various ships?

A. We had what we call a general letter which we wrote every voyage in which we have a resume of what happens during the week and what the prospects are; it is all problematical.

Q. It is a matter of routine?

A. It is a matter of routine.

Q. And have you any letters in your file with respect to the "Galileo" on the June or August voyages?

A. I should say yes.

Q. Will you be good enough to produce those letters?

The Court: Have you got them here?

The Witness: No.

The Court: He hasn't them here.

Mr. Keating: We will have them here in the morning; we have all the correspondence.

By the Court:

Q. Was this Mr. Sanderson the well-known Sanderson in the shipping world? Isn't there a well-known name of Sanderson?

A. L. B. Sanderson, it is Sanderson & Son, who was acting for our line at one time.

Q. Did he act for other lines?

A. He acted also for the Royal Mail, Lloyd Bowen Sanderson was president of Sanderson & Son, acting in the capacity of agent for the Atlantic Transport Steam Navigation Company, Lamport & Holt, and Nelson Line.

[fol. 439] By Mr. Jones:

Q. They were agents for the "Vestris" when she went out on her fatal voyage?

A. Sanderson & Son, yes, sir.

By Mr. Keating:

Q. Is Mr. Bowen Sanderson dead?

A. Yes, sir.

Q. He wasn't the active head of your company?

A. No, sir.

Q. Who was the active head?

A. E. Lloyd Sanderson was the active head.

Mr. Keating: May it appear on the record that I have produced certain correspondence for Mr. Jones' inspection?

The Court: Yes.

By Mr. Jones:

Q. You were in court this morning when the chief engineer and Magarelli were testifying, were you not?

A. Yes, sir.

Q. What was the first you heard of this story between the chief engineer and Magarelli?

A. I should say about a year ago was the first I ever heard of it.

Q. That was the first time you ever heard of it?

A. Yes, sir.

Q. I notice a number of letters from Ellerman's Wilson Line, Ltd., in which they say—a typical thing is the letter

dated the 16th of September: "Grain: We are glad to have your cables reporting bookings at 3/6d. and understand total forward engagments are now:

"Idaho," 24th Sept., 5 Loads at 3/.
4 Loads at 3/3.
1 Load at 3/6.
[fol. 440] "Marengo," 8th Oct., 5 Loads at 3/6d.
October shipment, 5 Loads at 3/6d.
Oct.-Nov.-Dec. monthly, 5 Loads at 2/6d a/c.
A. E. Strauss & Co.
Oct.-Nov.-Dec. monthly, 5 Loads at 3/-.
Sanday & Co."

Apparently from that letter and from a number of other letters which I have perused, it was a common practice for you to cable when you made these bookings?

A. Bookings of grain, yes, sir.

Q. And from a letter dated the 3rd of September, I read the following: A letter addressed to Messrs. Ellerman's Wilson Line, Limited, Hull, England, written by Ellerman's Wilson Line, New York, Inc., Vice President—no signature, but Vice President typed in, and at the bottom of the letter is ELS:EBR, I suppose Mr. Sanderson wrote the letter. "'Galileo': We are writing you separately with regard to the unfortunate accident of this steamer. We cabled you on the 28th Aug. advising this vessel had left that day, having on board for

Hull	4,878 tons.
Newcastle	773 "
Antwerp	60 "

Also, 86 cases Gunpowder weighing about 8 tons, about which we have already written you. We sent you further message on the 31st, giving 'Galileo's' earnings as

Hull	£2,441.4.3
	$13,503.24
Newcastle	$5,067.00
Antwerp	$815.64."

[fol. 441] That, I suppose, is a letter that you sent?

A. Yes, that is a general letter.

Q. Now, you refer to having written separately, where is that letter, do you know?—You can read the letter and note what I referred to.

A. That would be September 3rd.

Q. I am quite right about that, am I not, Mr. Neale?

A. Yes.

Q. Then I call your attention also to a letter dated the 19th of August, 1926, which was received apparently by you on August 28, 1926. I have given those dates correctly, have I not, Mr. Neale?

A. That is right.

Q. And I call your attention to the following passage in that letter: " 'Galileo': We thank you for cables advising this steamer's arrival with you on the 17th.

As your grain engagements for this steamer now total 11 loads we are hoping you will be able to give her an approximately complete homeward cargo."

That is the letter you received before this steamer's actual departure, isn't it?

A. Yes, sir, the same day she sailed.

Q. Then I call your attention to a letter which is dated the 12th of August, 1926, written to you by Ellerman's Wilson Line, Ltd., Hull, which was received by you on August 21, 1926, and I will read the following passage from that letter: " 'Galileo': You will of course require to bunker this vessel for the homeward passage. If the coal strike is not ended we shall also require you to give her about 800 tons for transfer to 'Francisco', but about this we shall cable you later.

Grain engagements: We have to acknowledge your cable [fol. 442] reading 'Melady two "Galileo" 2/6', but as we have no trace of the shippers Melady on our list we are waiting your confirmation as to their identity. We hope you will be able to continue bookings at certainly not less than 2/6d."

What does the name Melady mean?

A. That means that a firm by the name of Melady had booked with us two loads of grain.

Q. What is the weight of the grain?

A. 214½ tons.

Q. Now I have before me a letter dated August 20, 1926, addressed by you to Ellerman's Wilson Line, Ltd., Hull,

from which I read the following paragraph: "'Galileo'. Reached New York on the 17th inst., which we cabled you. Steamer's discharge has now been completed, and in accordance with your cable received this morning are loading an additional 850 tons of bunker coal for transfer to the 'Francisco' on 'Galileo's' arrival at Hull, in addition to steamer's homeward bunkers. Since last writing we have accepted further grain for this steamer, making her total commitment at time of writing 11 loads of heavy grain for Hull at 2/9d, and we are in hopes of securing steamer's requirements prior to sailing which, after deducting space necessary for the bunker coal, we estimate as 18 loads. Present cargo prospects are:

Hull	3,100 tons
Newcastle	850 tons
Antwerp	50 tons

earnings on which we estimate between $21,000 and $22,000. We are further informed by Messrs. DuPont de Nemours & Company that we will undoubtedly receive 84 cases [fol. 443] of gunpowder in time to load on the 'Galileo'. We are therefore building a magazine in 'Galileo's' shelter deck and will be including this information in our sailing cable."

Where on the ship did you build that magazine?

A. I couldn't tell you the exact position.

Q. You don't know?

A. No.

Q. Can you look at the stowage plan and show me where it was (handing plan to witness)?

A. It is on one shelter deck.

Q. No. 1 shelter deck?

A. Yes.

Q. In other words, it is in the space marked F on this plan, isn't it?

A. Well, No. 1 is apparently this point. I think the 1 and 2 holds, it is open all the way through and there is a magazine there.

Q. Now I will draw a pencil mark around that so that we may be able to identify it. I draw a circle around it with an arrow pointing to it, and I write the word "Maga-

zine" along the shaft of the arrow. That is the space that you put the magazine for the powder, isn't it?

A. Yes, sir.

Q. And it was known on the 20th of August that you thought to build that magazine as appears on this letter—I wish you would look at the letter and see that I am quite certain in stating the facts.

A. That is correct.

By the Court:

Q. Who ordered that magazine built?

A. Well, it was a precaution that is adopted in carrying powder.

Q. Who ordered it?

A. We ordered it.

Q. Your company?

A. Our company, yes sir, it having been decided that [fol. 444] that was a good place to put it.

Q. Who decided that that was a good place to put it?

A. The master.

Q. Did you take it up with him personally?

A. I didn't, no, sir.

Q. You don't know then whether he did or not?

A. I know that everything is taken up with the master; this particular cargo was certainly taken up with him especially. We don't carry very much gunpowder.

Mr. Jones: Have you that letter which I asked for?

Mr. Keating (handing paper to counsel): This is the report of the accident, Mr. Sanderson's report.

Q. Now, as I understood you, Captain Isbister had nothing to do with your company?

A. That is right.

Q. I notice from this letter, dated the 3rd of September, 1928, being the report of the accident, that Mr. Sanderson writes as follows: "Our cable of 1st inst. was sent after full discussion in our lawyer's office, at which representatives of steamer, London Salvage Association, Johnson & Higgins, and Merritt & Chapman were present. Captain Isbister and Mr. Ross estimate that repairs to steamer if and when she is raised will exceed $100,000. At time the

above cable was dispatched, we were of the opinion that in view of this vessel laying outside the North River Channel, the United States Government would probably refuse to remove her in the event of your deciding to abandon her, but after further deliberation we cabled you on the [fol. 445] 2nd that it had been developed the position of steamer was considered navigable water and therefore there would be no obligation on the part of your goodselves or underwriters to remove vessel if abandonment was decided upon."

Mr. Jones: I think that means it was decided it was not navigable waters.

Mr. Keating: That is right.

Q. Now, Captain Isbister apparently was in on this case, wasn't he?

Mr. Keating: I employed him.

A. I don't know.

Q. You don't know anything about his employment?

A. No.

The Court: Is it a rule that if you sink your boat in navigable water you don't have to raise her yourself?

Mr. Keating: That is right, sir. Captain Isbister and Mr. Ross were two of the experts I employed.

Q. Now, there is this paragraph: "We have also to acknowledge receipt of your cable of September 1st giving us the insured values of the 'Galileo', and in view of its strictly confidential nature, we handed this over to Mr. Keating, of our counsel, for his information. You will have seen that in order to distinguish the sequence of messages referring to this unfortunate accident we have numbered our cables." You had apparently quite a number of cables in connection with this accident.

[fol. 446] Mr. Keating: We have them.

Mr. Jones: May I see them?

(Mr. Keating hands a file to counsel.)

Mr. Keating make a note that we have produced the cables.

Q. Now I also note from this letter of September 3rd the following paragraph: "From Captain Barron's report

you will have observed that writer was on board 'Galileo' from 10:20 A. M. Sunday (29), until 4:30 P. M. that evening, and we would like to say that Captain Barron took all possible precautions in steamer's interest, and we feel that his actions during this disastrous fire were in every way justified and he did everything physically possible to save his ship. Our lawyers have taken depositions from Captain Barron, Chief Officer and Chief Engineer, which will be forwarded to you in due course." And that letter is apparently written by Mr. E. L. Sanderson, is that correct?

A. Yes, sir, that is correct.

Mr. Jones: That is all, if your Honor please, pending the examination of the cables.

By Mr. Keating:

Q. Mr. Neale, your company doesn't employ Mr. Ross, the other expert mentioned by Mr. Jones, does it?

A. No, sir.

Q. They were called in by me, were they not, those men?

A. Called in specially, yes, sir.

[fol. 447] Harry J. Hicks, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Keating:

Q. Mr. Hicks, what is your business?

A. Pier superintendent.

Q. And by whom are you employed?

A. By the Ellerman's Wilson Line.

Q. New York?

A. New York.

Q. They are the people that pay you, are they?

A. Yes, sir.

Q. How long have you been pier superintendent for the Ellerman's Wilson Line, New York, Inc.?

A. A little over 7 years, and about 8 months, as assistant superintendent.

Q. Mr. Hicks, what has your training been? Are you a marine engineer or marine superintendent?

A. No, sir.

Q. How did you start life?

A. On the docks as a tallyman on the pier, about 23 years ago.

Q. Tallying cargo?

A. Tallying cargo and receiving cargo.

Q. Have you ever been to sea?

A. No, sir.

Q. Are you an expert on coal?

A. No, sir.

Q. Who is in charge of the pier where the "Galileo" loaded?

A. I am in charge of the pier.

Q. Does the Ellerman's Wilson Line at New York have a marine superintendent?

A. No, sir.

Q. Do they have a superintending engineer?

A. No, sir.

Q. Now, as pier superintendent, Mr. Hicks, what were your duties with respect to the "Galileo"?

A. Well, I have pretty near everything to do with the pier, pertaining to the pier, hiring clerks, hiring towboats, [fols. 448-a-k] broken doors, having them repaired, hiring lighters to ship cargo alongside of the steamer, seeing that the manifest is written up, checking in the laborers from the longshoremen, the overtime, and working with the stevedores unloading the steamers.

Q. What do you have to do with the cargo that comes on the dock?

A. Receive it and lay out the space where the cargo is to be placed on the dock.

Q. You have a check tallyman?

A. I have a checker and an assistant also.

Q. You have watchmen on the dock?

A. Yes, sir.

Q. For watching over the cargo on the dock?

A. Yes, sir.

Q. Do you have anything to do with loading the cargo on board the steamers?

A. Under the captain's supervision, yes.

Q. What are your duties?

A. The freight, I receive from our New York office an engagement sheet of the cargo that is committed for the steamer, and I make out four copies; I also draw a rough plan of the cargo that is committed for the ship, one for the captain, one for the chief officer, one for the stevedore and one for myself and when the steamer arrives I go aboard and give the captain a list of the cargo that has been received or committed for the steamer and also give him the rough plan, and he calls the chief officer, and between the chief officer, the captain and myself, he lays out the cargo for the lower holds, for the stability of the ship; I take the stevedore's plan and my own and make the corrections on them with the captain's directions, and turn them over to the stevedore.

[fol. 449] Q. Have you any authority over the captain?

A. Oh, no.

Q. Can you tell the captain where you want certain things stowed?

A. No; he tells me.

By the Court:

Q. You don't mean the lower hold?

A. The captain doesn't lay out every package that comes for the ship, a package of shoes or soap, that is general cargo; it is for heavy cargo, lead or copper.

Q. Do you only consult him about what is to go in the lower holds?

A. And on the decks also; we lay out cargo for the lower holds whichever is heaviest, and he puts general cargo in No. 3 holds, and I will mark that on my plan and work according to his directions.

By Mr. Keating:

Q. What have you to do with coal?

A. Coal—nothing, only order the coal gotten when the ship is ready to take the coal, call the man up on the 'phone, and he comes down.

Q. Do you select the place to put the coal?

A. No.

Q. Who selects that?

A. That is done by the captain and the engineer.

Q. Have you any authority as to where the coal is to be placed?

A. No, sir, it is not my duty.

Q. Do you know anything about coal, Mr. Hicks?

A. Nothing.

Q. Now, prior to June, 1926, did the vessels of the Ellerman's Wilson Line take their coal here for the round, or somewheres else?

A. Prior to June, the "Galileo" voyage?

[fol. 450] Q. Yes.

A. No, they took their coal on the other side.

Q. And when the "Galileo" arrived here in June what did you have to do with the coal that was put in No. 3 between decks and No. 2 shelter decks?

A. The new coal?

Q. Yes.

A. I had nothing to do with the coal, putting it in.

Q. Did you order the hold trimmers?

A. I ordered the coal gang, as we call it.

Q. Who did you get orders from to order the coal gang? Did you get any such orders?

A. Except when the captain was ready to put the coal in, I ordered the coal gang.

Q. Did anyone tell you where the coal was to go?

A. The captain told me where he wanted the coal to go; when the grain was loaded in the No. 3 hold, I asked him if he wanted the coal to go on those.

Q. Did he say where it was to go?

A. Yes, No. 3 between deck, No. 3 hold, and in between spaces.

Q. The head of the coal gang reports to the chief engineer?

A. Mr. Magarelli, who was here this morning, reports to the engineer.

Q. Does he take his orders from him?

A. Yes, he takes orders, whatever he tells him is to go in the other decks.

Q. When the vessel arrived back here in August, 1926, I think it was the 17th of August, did you have anything to do with the coal at that time?

A. No, sir.

Q. What orders did you get with respect to the coal, if any?

A. Oh, I don't know as I got any orders.

Q. Did the captain tell you where to put the coal that went in in August?

A. Surely.

[fol. 451] Q. Where did he tell you to put it?

A. 3 between deck and shelter deck.

Q. And it was put in there, was it?

A. Yes, sir.

Q. To whom did Magarelli, the coal foreman, report in August, 1926?

A. The chief engineer.

Q. And take his instructions?

A. Oh, yes, at all times.

Q. Now, Mr. Hicks, these two exhibits, E and F, are they made up on the pier?

A. Yes, sir, they are made by my assistant, Mr. Muller.

Q. What is done with them?

A. The writing is taken aboard for the chief engineer to fill in.

Q. Where are those filled in, do you know?

A. The day the ship leaves or the day before.

Q. And what is then done with them?

A. They are sent to our New York office.

Q. Did anyone from the shore, as far as you know, give any instructions to the captain or the chief engineer as to where to put the coal?

A. No, sir.

Cross-examination.

By Mr. Jones:

Q. Mr. Hicks, do you work for anybody other than Ellerman's Wilson Line, New York, Inc.?

A. Do you mean now?

Q. I am not interested about now—in August, 1926?

A. I worked for the Ellerman's Wilson Line.

Q. Were you paid by the Ellerman's Wilson Line, Hull, or Ellerman's Wilson Line, New York, Inc.?

A. New York.

Q. Did you get paid in cash or by check?

A. I make the payroll up——

Q. Does it come from Hull?

A. No, I make the payroll out and take it to the New [fol. 452] York office, and it comes back in envelopes.

Q. And your salary comes back in cash?

A. Yes, sir, from the New York office.

Q. You don't know where the money comes from, whether from Ellerman's Wilson Line, Ltd., Hull, or Ellerman's Wilson Line, New York, Inc.?

A. It comes from the New York office; it is on a New York bank.

Q. All you know is you get a certain amount of cash sent you by a messenger from the New York office?

A. Exactly.

Q. I tried to follow you in giving your evidence, and I got a little mixed up. I understood you to say that you made out the stowage plan before the ship arrived, then you would go aboard the ship and show it to the captain, and if he wanted to make any changes, he would show the changes to be made?

A. Not before the ship arrives; I make it out the day the ship comes there or maybe the day before, I may make it out Thursday afternoon and the ship arrives Friday, or I may make it out Friday before I go aboard the steamer.

Q. Now, so I can be quite certain what your evidence is, I show you Exhibit No. 13 and ask you whether or not you made this plan up?

A. No, sir, I did not.

Q. Did you make a copy of it up?

A. No, sir; that is made up by my assistant, Mr. Muller.

Q. Was it made up under your supervision?

A. No, I made mine up on a yellow piece of paper.

Q. Where does he get it?

A. He makes it up as the ship is loading.

Q. Where is the yellow paper?

A. This is a copy of it.

[fol. 453] Q. Have you the original that you made up on yellow paper that you told me about?

A. No.

Q. You threw it away?

A. It is not made in this form at all.

Q. How is that made?

A. I will show you if you will give me a piece of paper.

Q. (A piece of paper is handed to the witness.)

A. I am just giving you an idea.

Q. That is what we want.

A. The next steamer may not be like this at all, it may be a grain ship.

Q. We understand.

A. That is a rough sort of a way.

Q. Now, what you did then is to put holds——

Mr. Jones: I ask that this be marked in evidence.

(The paper is marked Exhibit 24 of this date.)

Q. Now I show you Exhibit 24, which you have just prepared to indicate how you prepare the plan, and you have written the words "Holds, 1, grain, 2, grain, 3, grain"; I suppose you mean by that lower holds?

A. Exactly.

Q. And then you have "4 oil", that means lower hold No. 4 used for oil?

A. Yes.

Q. "5 grain lower hold"; that means No. 5 was used for grain?

A. Yes.

Q. And No. 6 used for grain?

A. Yes, sir.

Q. And between decks No. 1, provisions, No. 2, general cargo, No. 3 general cargo?

A. Exactly.

Q. No. 4, provisions?

A. Yes.

Q. No. 5, provisions, No. 6 provisions?

A. Exactly, yes.

[fol. 454] Q. Now, what are those provisions?

A. Well, that could be lard or it could be bacon; we take considerable bacon and lard.

Q. That doesn't mean for consumption aboard ship, does it?

A. No, that is cargo; this is an illustration.

Q. And what do you do with the shelter deck?

A. I put maybe general cargo, and if it is apple season, I may put apples there.

Q. And you make up then a list similar to this one?

A. A rough list.

Q. Similar to Exhibit 24, the only change being that you would have something here for shelter deck, and fill out what you had for the shelter deck and give it to the captain?

A. Yes.

Q. And after you have shown it to the captain, if he makes any criticism of your list, you correct it accordingly?

A. He takes it and makes whatever alterations he wants.

Q. Did you do that in the case of the "Galileo" on the August voyage in 1926?

A. I presume I did.

Q. To the best of your recollection you did it?

A. I think I did.

Q. Who orders the lighters and the trucks, and so forth, to come to your pier?

A. Who orders the trucks to our pier?

Q. Yes.

A. They are not ordered, they are delivered according to their permits; if they have a permit to deliver on the 10th of the month, they deliver then.

Q. You can't put on your pier the entire cargo of a ship at one time?

A. No.

Q. The pier isn't big enough to hold it?

A. No.

Q. There must be some orderly method of getting cargo on your pier so you can get it on your ship?

A. Exactly.

[fol. 455] Q. And it must come there either by one or two conveyances, either by land or water?

A. Yes, sir.

Q. Now, the land conveyances are trucks and railway cars. Do any railway cars come on your pier?

A. Not on the pier, just outside of it.

Q. And the water conveyances are what we call lighters?

A. Lighters, exactly.

Q. Now, there must be some method of getting those lighters to your pier and the trucks and railway cars to your pier to avoid congestion?

A. Yes, sir.

Q. And if all the shippers just act on their own volition as to ordering cargo to go to you, it would mean that you would be overwhelmed and things would go helter-skelter?

A. Yes, sir.

Q. So somebody must call up the shippers and direct them when and where to deliver, that is true, isn't it?

A. No, there is nobody on the pier to call up; they follow their permits.

Q. Who issues the permits?

A. At the New York office for the first or second or third of the month, and they deliver accordingly.

Q. Now, for a ship like the "Galileo" arriving on the 17th, when were the permits issued?

A. I don't know.

Q. Before she arrived?

A. They might permit small packages, truck freight, they may permit that for the first two or three days, and then they will permit the larger commodities, 2,000 bags of flour, or 200 tons of lead or copper, that wouldn't be ordered much lower.

Q. Are you consulted by the New York office about issuing these permits?

A. No; a good many of those permits are issued before the ship arrives.

Q. So neither you nor the ship's people have anything to do with issuing permits?

[fol. 456] A. I won't say that; the office may call me up and ask me when I would be ready to receive 100 tons of copper; I would try and give them a date as soon as possible; if the captain wants that down in No. 3 hold I would give that as soon as possible, when that hold would be empty, so the copper could be placed there, and if it was going to be ready for Wednesday, I would tell them Wednesday so a permit would be issued for that day.

Q. So if anyone is called up from the New York office you are the person who is called up?

A. Yes, sir.

By Mr. Keating:

Q. Mr. Hicks, you have given us a list of cargo, to give us a typical example, is that correct, that is Exhibit 24?

A. Yes, sir.

Q. Do you make up a similar list for the ship's stores and bunkers?

A. No, I have nothing to do with stores.

Q. You don't put on this rough list anything about coal?

A. No, sir, I have nothing to do with it.

Q. Mr. Hicks, do you remember these long steel pieces of cargo, I think there was testimony about them?

A. I remember them well, yes, sir.

Q. What do you remember about them?

A. If I remember right, they came from a Pennsylvania lighter and they took one off on the pier, and they were quite long, I thing about 60 feet, and the rest lay alongside of the steamer, and they were—I don't know whether it was the last day or the day before the last, they went aboard.

Q. Now, when did they come with reference to the finishing of the steamer, do you know when they were booked? [fol. 457] A. They came, it was either two or three days before the sailing of the steamer they arrived by a Pennsylvania lighter, I think, and the steel came down, I think 8 ton or 6 ton or 4 ton, I don't know the weight of them now, but when I saw the size of them I called up the New York office and asked them about the length of them, and they said they didn't know the length, and I told them it was 60 feet, and I didn't know whether the captain would be able to take them aboard, and they said if not, they would have to leave them on the pier, for they didn't know the measurement of the plates when they booked them.

JOHN H. NEALE recalled.

By Mr. Jones:

Q. Mr. Neale, I find a cable in the files which Mr. Keating has produced which was apparently received by you or your office on August 31, 1926, at 5:34 A. M., reading as follows: "Wilson Line, New York City. 'Galileo': Presume you have utilized Captain Isbister for technical advice. Anxiously awaiting further news." I ask you if that isn't a cable you received at the time that I mentioned, and look at the time and see if I have interpreted that correctly?

A. August 31st.

Q. At 5:34 A. M., that is correct, isn't it?

A. That is correct.

Q. And then there is a cable which you apparently sent in reply to that, in which you say, "Isbister and other expert report cost of repairs to steamer if and when raised

may exceed one hundred thousand dollars." Did I read that correctly?

[fol. 458] Mr. Keating: The whole cable, Mr. Jones, is about salvage.

Mr. Jones: Yes, I just want to connect up Captain Isbister.

Q. Do you see that down at the bottom there? I had trouble finding it myself.

A. Yes, sir.

Q. Now when was that cable sent? I don't see anything on it to indicate.

A. September 1, 1926.

Q. It was sent in code?

A. Yes, sir.

Q. And that is a translation of the code?

A. Yes, sir.

Q. And that is the reason no date appears on the translation?

A. Yes, sir.

Q. Now, apparently from the cable from the owners, "I presume you utilized Captain Isbister," it would indicate that Captain Isbister was commonly employed by you?

A. No, sir, he is not.

Q. Well, how do you explain the language that was used by the owners, "Presume you have used Captain Isbister"?

A. Captain Isbister is a director in Ellerman & Buckner, and undoubtedly in Hull they knew he was out here and they undoubtedly wanted some expert——

Q. You don't know whether it was Mr. Ellermans, but there is a gentleman named John Ellermans who owns all these Ellermans' companies?

A. Sir John Ellermans.

Q. He is a controlling factor?

A. I don't think he owns a controlling share.

Mr. Keating: In what company?

The Witness: Ellerman & Bucknall.

Q. He is the sole owner of Ellerman's Wilson Line?

A. He is the sole owner of Ellerman's Wilson Line.

[fol. 459] Q. And he has a very potent voice in Ellerman

& Bucknall, and I suppose it was that potent voice that spoke when he said, "Presume you used Captain Isbister"?

A. It sounds possible.

Q. You know, don't you, that if you store coal on top of steel plates it causes dampness and corrosion to the plates?

A. No, sir, I don't.

Q. You don't know anything about that?

A. No, sir.

JOHN S. HECK, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Keating:

Q. Mr. Heck, what is your position in life?

A. Surveyor for Lloyds Register. I am known as the senior engineer surveyor of the New York office.

Q. Of Lloyds Register of Shipping?

A. Of Lloyds Register of Shipping.

Q. And what is Lloyds Register of Shipping?

A. The shortest words I can use, it is an institution for the classification of ships. It has other objects, but that is the main one.

Q. It issues certificates regarding their seaworthiness, does it?

A. Regarding their strength and seaworthiness, yes, sir. Seaworthiness is only limited to their strength and safety.

Q. Has it any connection with any steamship company or insurance company, or anything of that sort?

A. No, sir, it is entirely independent.

Q. It is an independent organization?

A. It is an independent organization, and makes no profits.

Q. Now, Mr. Heck, will you please state to the Court [fol. 460] your experience, your general experience as an engineer on board ships? Start at the beginning and tell the Court just how you acquired your knowledge which has led up to your being the chief engineer surveyor for Lloyds in New York?

A. Well, I have been intimately connected with ships all my life and started going to sea at 9 years old, but my first serious connection with shipping would be in 1895. At that time I made a long voyage, just after leaving school, in the fall of 1895. Next I served an engineering apprenticeship, and I spent four years building engines. Then I spent four years in the drawing offices, designing them, approximately four years. I was those four years approximately at sea as an engineer of sea-going vessels.

Q. Were they coal burners?

A. All coal burners. And in May, 1907, I was appointed a surveyor to Lloyds Register, and I have been there ever since.

Q. How many years' experience have you had surveying ships for Lloyds in New York?

A. Well, that is rather difficult; in New York somewhere between 6 and 8, approximately 7 years.

Q. And where prior to that were you?

A. I was stationed first in Glasgow.

Q. As a surveyor?

A. As a surveyor. Next in Hull; next in Pittsburgh; next in Cleveland; a short term in New York, a temporary term. Then I was in Boston for approximately 9 years, and I have been now in New York approximately 6 or 7 years, I am not quite certain.

Q. And during that time how many ships do you suppose you have gone aboard?

A. Oh, it must be in the thousands, Mr. Keating; I suppose I averaged 300 ships a year for 23 years, so somewhere between five and ten thousand.

[fol. 461] Q. Now, Mr. Heck, I show you the builder's plan of the steamer "Galileo", which is Exhibit 18, together with Exhibits 10, 11 and 12, being certain sketches of the steamer drawn approximately to scale, and I ask you to assume the following facts:

1. That the steamship "Galileo" is a steel cargo vessel of about 4100 registered net tonnage, having three decks and six holds, each hold being divided into a lower hold, a tween deck and a shelter deck;

2. That No. 3 tween deck compartment, located on the tween deck forward of the permanent bunker space and aft

of the No. 2 tween deck, is a compartment approximately 33 feet long, 50 feet wide and 10 feet high;

3. That the sides, bottom and top of No. 3 tween deck are steel, the forward end consisting of a bulkhead constructed of plan-s, wooden planks, about 10 inches wide and 3 inches thick, running vertically from the top of the compartment to the floor and held in place or fitted into grooves composed of sills or pieces of wood about 10 inches wide and about 6 inches high placed against the bottom and top of the bulkhead on each side; that the edges of each plank are planed and fitted closely together; that over each seam where the planks come together strips of wood or battens about 3 inches wide and about ¼ of an inch thick were nailed on both sides of the bulkhead, wire nails were used, the nails on each side of the batten being about one inch apart; that there were also made fast to the No. 2 tween deck side two or more separation cloths somewhat larger than an ordi- [fol. 462] nary hatch tarpaulin, made of material somewhat similar to bagging, although heavier and of a closer texture, which were attached to the bulkhead at the top by placing a batten outside of the separation cloth and nailing it against the bulkhead; that where the separation cloths overlapped a batten was nailed vertically over the separation cloths against the bulkhead to join them together, the battens being similar to those used on the seams of the bulkhead; that this bulkhead ran to each side to the shell plating of the steamer;

4. That the after end of No. 3 tween deck consisted of a bulkhead made of steel in the way of the hatch hereinafter referred to; that this after bulkhead in the wings was constructed of planks of the same description as the forward bulkhead with batters nailed over the place on each side where the planks came together in the same way as battens on the forward bulkhead, except that in the case of the after bulkhead the planks ran horizontally instead of vertically, that there were not any separation cloths attached to it and there was a door constructed in it on each side leading to the tween deck cross bunker; that through the top and bottom of this compartment, being the shelter and tween decks respectively, was a hatchway located in the middle of the ship about 18 feet wide running forward from

the steel bulkhead at the after end of the compartment approximately 15½ feet, thus making an opening approximately 15½ feet by 18 feet; that there was a grain feeder built of wood and full of grain running through the hatchways and through the compartment and built against the steel bulkhead extending from side to side of the hatchway [fol. 463] and running from the hatchway forward less than half the length of the hatchway already described; that this No. 3 tween deck compartment is ventilated by two telescopic ventilators which are located on either side of the hatchway 6-7 feet out from the side of the hatchway and about 23 feet aft of the forward bulkhead; that the openings of these ventilators into this compartment were approximately 12 to 14 inches in diameter;

5. That No. 3 lower hold was filled with grain and the hatch over No. 3 tween deck was covered with hatches and that two tarpaulins were battened down over it. Assuming all of these facts will you state whether or not in your opinion No. 3 tween deck was a proper and safe compartment in which to load and carry bunker coal?

Mr. Jones: Does it say that the bunker was not air-tight?

Mr. Keating: I don't think I said that, but I will put that in.

A. Assuming that the bulkhead was not air-tight?

Q. Can you state whether or not No. 3 between deck was in your opinion a safe and proper compartment in which to load and carry coal?

A. Yes, sir, I can. In my opinion that arrangement was a safe and proper way in accordance with good steamship practice. There are many ships at the present day carrying such an arrangement. In fact, I might say that almost every large freighter burning coal making a long voyage has a similar arrangement, a great number, at any rate.

Q. You have seen that yourself?

A. I have seen it this morning, Mr. Keating.

[fol. 464] Q. You have seen it this morning?

A. The last ship before I came here I saw the same arrangement exactly.

By the Court:

Q. Well, in classifying ships for this Lloyds Bureau would you have to take into account such an arrangement as that, or does your classification deal with things other than arrangements such as this for temporary bunkers?

A. No, sir, we would not take it into consideration in classifying the ship. There is a minimum number of watertight bulkheads which is required; if there is that minimum number on a ship we classify it.

Q. So it hasn't ever been part of your official duties to pass on the safety of this sort of an arrangement, has it?

A. No, sir, I am merely stating my opinion.

By Mr. Keating:

Q. Now, Mr. Heck, assume in addition to the facts contained in the hypothetical question already stated to you the following facts:

1. That on August 25, 1926, there remained about 160 tons of coal out of 360 tons of Morrisdale coal which had been put into this No. 3 tween deck compartment on June 30, 1926, and that the 160 tons of coal which remained were in a pile against the forward bulkhead running up to within 3 feet of the top of the compartment and sloping aft to about 3 feet forward of the forward hatch coaming and slanting down from the sides of the ship to close to the sides of the hatch coaming.

[fol. 465] 2. That upon careful inspection by the chief engineer before loading any additional coal the 160 tons of coal remaining were found to be cool and showed no signs of heating; will you say whether or not it would be a safe and prudent thing to load an additional 200 tons of Morrisdale coal on top of the coal remaining since June 30th, assuming that all the coal in No. 3 'tween deck would be discharged from the steamer within 16 days or shortly thereafter?

Mr. Jones: I object, if your Honor please, as not in accordance with the evidence. The chief engineer, as I take it, has now confessed to the fact that the coal was not cool.

Mr. Keating: That is quite true, your Honor, but one of the issues raised by Mr. Jones was that it was negligence to take any coal in there in any condition.

Mr. Jones: I agree and I think I am right.
The Court: The objection is overruled with exception.

Q. Do you understand the question, Mr. Heck?
A. I think I do, Mr. Keating. I should say that the whole responsibility was the chief engineer's; if he decided that the coal was safe, then he was justified; he may have made an error of judgment, but he did not make an error of negligence.

Mr. Jones: I move to strike it out as not responsive.
The Court: Strike it out, with exception.

[fol. 466] Q. The question, Mr. Heck, is this: Can you say whether or not it would be a safe and prudent thing to load an additional 200 tons of Morrisdale coal on top of the coal remaining since June 30th, assuming that all the coal in the between decks would be discharged from the steamer within 16 days, or shortly thereafter?
A. Well, that would all depend on the state of the old coal, Mr. Keating, as I tried to say before.
Q. I am asking you to assume that it was cool.
A. That it was cool and inspected by a competent man?
Q. Yes.
A. Then it was a reasonable and safe thing to do. It was proved commercially that it was not safe in this instance.

By the Court:

Q. What experience have you had in handling coal?
A. I was actual engineer at sea from 4 to 5 years.
Q. That was a good many years ago?
A. That was from 1903 to 1907.
Q. Have you had any contact with such a problem as this since 1907?
A. Oh, yes, sir.
Q. In what connection?
A. I was a surveyor, having been called in in such an actual case, the heating of coal.
Q. As a surveyor do you ever have to determine whether it is safe to put coal in a place?
A. Yes, sir, to leave the coal in. May I recite the last case?
Q. No, don't go into particular cases. You see, I have got to weigh your testimony. Now, if you are doing this

sort of work, determining whether coal was safe under certain circumstances, your testimony would have more weight [fol. 467] than if you haven't had any more experience since 1907. Now, if you can tell me generally, not specific cases, what you have done on problems of that sort, how constantly you have had to deal with that since 1907——

A. I can remember about four cases since 1918; there may be more.

Q. Those were only cases where you had surveyed damage?

A. No, sir, where the coal had heated and I had to take the responsibility of issuing a certificate for the——

Q. It was for you to determine it was safe to put coal in?

A. No, sir, whether it was safe or not to take it out. This coal was in the bunkers already in each case.

Q. Whether it was safe to take the coal out of the bunkers?

A. No, whether it was safe to let the ship proceed with that particular coal in the bunkers.

Q. That was four times you did that?

A. Yes, that I can remember. I remember that very clearly.

Q. Did the owner apply to you for your advice?

A. Yes, sir, the owner's representative.

Q. Did they involve wooden bulkheads too?

A. Yes.

Q. How are wooden bulkheads usually made? Are they usually made in this fashion or are they made in another fashion?

A In which fashion?

Q. As described in this question?

A. Yes, that is a very common way of making them in between decks particularly, a very common way.

Q. Well, would you from your knowledge of shipping think there was a safer way of making a bulkhead?

A. Yes, sir, there is always a safer way.

Q. What else could they have done?

[fol. 468] A. They could have made it very much stronger, sir, they could have first of all bolted the steel beams on the deck, then carried strong uprights to the beams.

Q. You have just in mind strengthening it?

A. Strengthening it and making it double sheathed.

Q. Sheathed with metal?

A. No, three thicknesses of wood.

Q. What is the advantage of that?

A. You close up any crevices.

Q. Do they ever caulk it?

A. Not a portable bulkhead of that nature, but only a very rough separation; the one I saw this morning had paper pasted over it.

Q. Paper would exclude the air better than this?

A. Paper pasted on doubtless would be about as good a thing as you could do.

Q. You say you sometimes double sheath it. In about what percentage of the cases do they use double sheathing, if they are going to store coal any place?

A. That would only be where they intended it for long charter, for a term of years; that wouldn't be done for an ordinary single voyage, it wouldn't warrant the expense.

Q. Is it frequently the case that permanent bunkers have this sort of wooden bulkhead?

A. Bunkers which have lasted for many years, sir, it depends on what the meaning of the term bunker is, but in practically every bunker one bulkhead is not air-tight; only one bulkhead of the bunker is air-tight.

Q. But that, I suppose, is the bulkhead against which they pile the coal, is it?

A. I know in the case of this class bunker here, sir, referring to the plan, one of these would be a water-tight bulkhead, and they will be perfectly tight; the other one will [fol. 469] consist of steel plates riveted together and not caulked. So assuming that this is a water-tight bulkhead, I see it is so marked, assuming that that is a water-tight bulkhead, a certain amount of air can seep through that bulkhead.

By Mr. Keating:

Q. Mr. Heck, assuming all the facts that I stated in both those hypothetical questions, can you state whether or not it is usual and customary in the Port of New York to load coal on other ships similar to the "Galileo" in similar places to No. 3 between deck of the "Galileo", as described by you?

Mr. Jones: I object on the grounds stated in my previous objection directed to questions of this character. You may

remember, your Honor, I enumerated five different grounds of objection to this, and you overruled it and gave an exception.

The Court: Overruled with exception.

A. I have seen it loaded in similar places; I cannot say that I have seen it loaded in that exact place.

The Court: Of course, that doesn't answer the question at all; I don't know whether you want an answer or not.

Q. Let me ask you the question again: Assuming all the facts stated in both hypothetical questions, that is, all the facts I have asked you to assume, can you state whether or not it is usual and customary in the Port of New York to [fol. 470] load coal on other ships in similar places to the No. 3 between deck of the "Galileo", as described by you?

Mr. Jones: My objection stands to these questions without the necessity of repeating it.

The Court: Yes.

A. I can only say that I have seen it loaded in similar places.

By the Court:

Q. You haven't seen it often enough to say that it is customary?

A. No, sir, it is not my duty. I am hard worked without exercising that function.

By Mr. Keating:

Q. Now, Mr. Heck, have you seen in the course of your experience a small or a large number of ships with permanent bunkers?

A. Oh, yes, sir, a great many.

Q. Have you seen a ship's bunker that was airtight?

A. No, sir. It is practically impossible to build a coal bunker which will be absolutely airtight. You must take in coal at the top and you must take it out at the bottom, and somewhere between those two openings there is room for a circulation of air into that coal.

Q. Is that true of every ship's bunker that you have seen?

A. Yes, I can say it is every ship's coal bunker.

Q. Now, what have you to say about the position of the

No. 3 between decks as I have described it to you, as regards [fol. 471] its accessibility to heat?

A. I should say the forward end is quite a good distance from any source of heat; the after end is fairly close.

Q. Do you know whether it is one of the causes of spontaneous combustion in coal?

A. Yes, it is one—now, I am going on other people's authority; to the best of my knowledge it is one of the determining factors whether coal will heat or not.

Q. Do you know the purpose of having ventilators over a coal bunker?

A. On top of the coal?

Q. Yes.

A. To carry off the explosive gases which are formed.

Q. Have they any other purpose?

A. No, sir, except to provide air for the men who must work in those bunkers.

Q. Now, a telescopic style of ventilator—where is the opening into the compartment for that ventilator, that type of ventilator?

A. In the between deck; it would be an annular opening around a vent which went to the lower hold.

Q. Is there any ventilation from the bottom in such a ventilator, to the bottom of the hold? Is the opening in the ventilator at the top or the bottom of the compartment?

A. At the top.

Q. There is no opening at the bottom of the compartment in a telescopic ventilator, is there?

A. No.

Q. Mr. Heck, from your experience is there any objection in your mind to loading a fresh supply of coal on old coal in the bunker where the examination has shown that the old coal is cool?

A. No, sir. We have to deal with ships commercially. It is constantly done. It would be of course very desirable [fol. 472] if you could never load any coal on top of any other coal, but it is not practicable in the operation of ships.

Q. Whose duty is it to determine whether any old coal is cool?

A. Whoever is in charge of the vessel; usually the chief engineer.

Q. And is it his duty to make an inspection?

A. Oh, yes, undoubtedly, undoubtedly.

Q. Now, is there anything that ought to be done with the old coal if new coal is put on top of it with respect to attempting to get it used up first, or anything of that sort?

A. Not necessarily; it would depend on the condition in which the engineer found the old coal.

Q. Assume he found the old coal cool and not heated, ought he to place that old coal in a position where it would be used up first?

A. That would all depend on circumstances, Mr. Keating. It would be very desirable if he did so; we wouldn't be trying out this case if he had done it in this instance, but it isn't absolutely necessary.

Q. Mr. Heck, do you know whether in coal spontaneous combustion is confined to any particular grade or age of coal on ships?

A. No, sir; the extent of my reading is that any class of coal may heat spontaneously.

Q. Mr. Heck, are you familiar with Mr. Milton's Bulletin, Exhibit No. 16?

A. Yes, sir, I am familiar with it. It is a good many years ago, but I am familiar with it, I received a copy of it when it was issued.

Q. I observe on page 17 of Exhibit 16 that Mr. Milton made the following statement: "8. If any coal is left in a bunker when a fresh charge has to be taken in, it should be trimmed into a position to ensure its being used on the next voyage. It cannot be too strongly impressed upon those [fol. 473] responsible that danger of overheating and spontaneous combustion increases with the length of time the coal remains in the ship." Do you agree with that?

A. Yes, that is quite correct, but it must be read with care, Mr. Keating. He doesn't mention what length of voyage he has in mind. May I give an example of that?

Q. Yes.

A. Let us take the English Channel, steamers from Dover to Calais, they make a voyage of one hour, and I don't think Mr. Milton would want them to strip out every voyage in that case.

Q. In other words, it depends a good deal on the length of the next voyage?

A. It depends on the length of the next voyage, yes, sir. I think you put that in the hypothetical question.

Cross-examination.

By Mr. Jones:

Q. Mr. Heck, I assume that you recognize that Mr. Milton was one of the authorities recognized by your Society on this subject of spontaneous combustion?

A. Oh, yes, he was a great authority.

Q. And you wouldn't advance your opinion in opposition to Mr. Milton's, would you?

A. Oh, yes, I would if I thought I was right, Mr. Jones.

Q. Don't you know that Lloyds Calendar has published a summary of Mr. Milton's recommendations and observations for every year since he got out this pamphlet?

A. Yes, sir, that was a classic.

Q. That is classic?

A. Yes.

Q. Mr. Milton said, in addition to that matter which was read to you by Mr. Keating: "Where bunkers are over gutterways, &c., special care should be taken that the limbers are tight. Several fires have originated in bunkers just [fol. 474] over the limbers, and there is reason to suppose that they have been caused by air circulating through the coal and coming from the limbers." Do you agree with that?

A. Yes, sir, that is just what I told Mr. Keating; no bunker is air-tight.

Q. No bunker is air-tight, and you agree that those limbers should be plugged up and made air-tight?

A. I should say that it would be a very desirable thing to do. It is not done.

Q. Not to do it is a dangerous practice, isn't it?

A. Not necessarily, sir.

Q. Well, you know that fires are likely to occur when you don't do it?

A. There are thousands of voyages made when there are no fires. The question as to the number of voyages which have a fire and the number of voyages which don't——

Q. You know, don't you, Mr. Heck, that this whole subject became a matter of active investigation because of the large number of fires?

A. The increasing number of fires, Mr. Jones.

Q. The increasing number of fires?

A. Yes.

Q. And it was to avoid the increasing number of fires if I may use your language, that these recommendations were made; isn't that true?

A. Yes.

Q. And it was recognized that there was a serious cause of danger which ship owners were neglecting, that is true, isn't it?

A. I do not know.

Q. Can you assign any reason for your Society going to the trouble of having Mr. Milton make this very learned report and have the publication of that report in Lloyds Calendar, which I assume was circulated among all ship owners as well as cargo owners, wasn't it?

A. My employers have nothing to do with Lloyds Calendar.

[fol. 475] Q. It is published by Lloyds of London?

A. Yes.

Q. And generally circulated among ship owners, isn't it?

A. Yes, sir.

Q. Can you assign any reason for the publication of that year by year for a long period of years except that it was recognized that ship owners were neglecting a precaution that they should not neglect?

A. No, I don't say that, for I have no knowledge, and furthermore, I don't know that the ship owners were neglectful, not deliberately neglectful.

Q. Let me call your attention to Exhibit 17, an official publication of the British Board of Trade—examine it and tell me whether or not what I said is true or untrue?

A. Which particular point?

Q. I am not asking you about any point at all. You recognize that as an official publication of the Board of Trade, do you not?

A. Yes, sir, it is a circular of the British Board of Trade.

Q. Now I call your attention to the following: "Ventilation into a mass of coal is prohibited. It should be carefully borne in mind that spontaneous combustion in coal cargoes is due to causes entirely distinct from the giving off of gases referred to above. Spontaneous combustion is promoted by the introduction of air into a mass of coal, and

for that reason surveyors should not accept any arrangement of ventilators which would deliver air into the body of the coals stowed in any compartment." Do you agree with that?

A. Right.

Q. Then: "Arrangement and area of ventilator orifices. Each hold or 'tween deck compartment in which coal is carried should be provided with at least two ventilators, one [fol. 476] for inlet and the other for outlet. They should be of about the same size and placed at the opposite ends of the compartment or as far apart as practicable." Do you agree with that?

A. That is a recommendation of the Board of Trade; I can't do anything else but agree with it.

Q. You know that the fore and aft are either ends of a compartment or in the ends of a ship. You don't refer to the side of the ship as an end of the compartment, do you?

A. I think you are rather dealing just with words there.

Q. No, I am not at all. I ask you as a ship surveyor when you speak of the end of a compartment, what do you mean?

A. I should qualify it; I should say the forward end and the aft end.

Q. Did you ever hear of the word end being used by any person who has anything to do with ships unless he meant the forward or after end?

A. I think not, no, sir.

Q. Now I will read you a passage from Exhibit No. 19, referred to by Mr. Keating, published by the Department of the Interior, Bureau of Mines:

"If air could be totally excluded, there would be no self-heating and no combustion." Do you agree with that?

A. Yes, sir. I would like to qualify that.

Q. How would you like to qualify it?

A. That in a ship's bunkers, as I answered Mr. Keating, you cannot exclude air altogether, the circulation, you would have to carry your coal either in an air-tight tank or in a submarine, which can be sealed hermetically.

Q. You mean to say you can't build an air-tight bulkhead?

A. Yes, sir, I can build an air-tight bulkhead, but I cannot [fol. 477] for a commercial ship build an air-eight compartment unless you will allow me to build one of those two

types of ship, which wouldn't be very suitable for carrying coal.

Q. A steel bulkhead can be made air-tight, can it?

A. Yes, sir.

Q. And you were telling his Honor about putting paper over a wooden bulkhead to make it air-tight?

A. Yes, sir.

Q. In fact, it is a very easy thing to do, isn't it?

A. Yes, sir.

Q. And it is not an un-sual thing to do, is it? You have seen it in many ships?

A. Are you referring to a steel or wood bulkhead?

Q. Wood.

A. I have seen it in many ships.

By the Court:

Q. Referring to a wood bulkhead with paper over it——

A. With paper or cleats, but some kind of cloth over it to cover up the seams.

Q. He is asking you about the paper on wood bulkheads.

A. No, sir, the paper this morning struck me as rather unusual.

Q. By cleats you mean battens?

A. Wood battens 2 or 3 inches wide.

By Mr. Jones:

Q. You have also seen shiplap used?

A. Yes, sir, and tongued and grooved.

Q. By shiplap you mean that that is a groove cut—do you want to draw a picture and show what the shiplap is?

The Court: Tongued and grooved?

[fol. 478] Mr. Jones: Shiplap is a little different.

(The witness draws a picture.)

By the Court:

Q. This would be more effective, shiplap, than battens, wouldn't it?

A. Yes, sir, it would be better.

Q. Tongued and grooved would be better than battened, too, wouldn't it?

A. Tongued and grooved would be stronger, sir. I don't believe that it would be any more air-tight, it would be a better job.

By Mr. Jones:

Q. The use of battens is one of the poorest methods, isn't it, as far as keeping the bulkhead air-tight is concerned?

A. It isn't as strong as the other things, it is more liable to become damaged.

Q. I am just thinking of it being air-tight.

A. Provided the battened bulkhead is in good condition it is just as air-tight as the other.

Q. Just as air-tight as the shiplap?

A. As shiplap or the tongued and grooved.

Q. It isn't as air-tight, of course, as a steel bulkhead?

A. I can see that a good wood bulkhead would pass no more air than a non-water-tight steel bulkhead, and no steel water-tight bulkhead would be fitted in such a position as that.

The sketch made by the witness is offered in evidence.

(It is marked Exhibit 25 of this date.)

[fol. 479] By the Court:

Q. These bulkheads that have paper over the cracks are not battened, are they, that is, it is either shiplap or tongued and grooved?

A. I couldn't say, sir; I didn't examine it very closely. I was rather hurrying my job to come here this afternoon, and I didn't examine it very closely.

By Mr. Jones:

Q. Now, Mr. Heck, where you lay beams of wood on the floor or deck of a vessel there is necessarily underneath those beams where you have the places, where the deck plates are joined, passages through which air can come unless you close those passages, aren't there?

A. Why, exactly, unless you close them up.

Q. Now, Mr. Heck, I call your attention to another recommendation of Mr. Milton, No. 5——

A. I have tried to follow them out for 20 years, Mr. Jones——

Q. Please don't interrupt me—where Mr. Milton makes this recommendation: "To minimize the absorption of oxygen by coal in the reserve bunkers, or in any bunker in which men are not actually working, the lower doors should be kept absolutely closed so as to prevent any current of air whatever passing through the bunker into the mass of coal." Do you agree with that?

A. No, sir; that is a very fine thing, but Mr. Milton used the term "Absolutely closed"; it is absolutely impossible to do that, with all due respect.

Q. Do you mean to say that a bunker which is not being actually used can't be kept absolutely closed?

A. It can be done, but not on an ordinary ship.

[fol. 480] Q. Why not?

A. Can I sketch the ordinary bunker door?

Q. You may, but I don't see why you can't shut a door and shut it tightly.

A. These doors are not like the doors you have in mind.

Mr. Jones: Mr. Heck has made a sketch which consists of a line which is somewhat wavy; at one end I put A and the other B; he has then drawn two frames, by each of which I will put the letter C, and he has drawn a line parallel to the line A-B, which I will mark D-E. Then he has drawn a figure which somewhat resembles an hour-glass to represent the opening into the bunker. Now, have I correctly described that?

The Witness: Yes, very good, Mr. Jones.

Q. Now, Mr. Heck, proceed with your explanation.

A. To start, those things are only rough, they are steel castings forged by a blacksmith; the plate is a ship's plate; the fireman's method of opening that door, he pounds it very vigorously with a heavy hammer to shake it free; he then inserts a long steel poker known as a slice underneath that, and he lifts it up with that in a very short time. That door is a very rough, very bent object, which could not be made water-tight.

Q. Then, Mr. Heck, don't you know that Mr. Milton knew all about those contraptions by going in and out of these bulkheads, and that Mr. Milton, having all those things in mind, made this positive recommendation, that is quite obvious, isn't it, and you were sent, as one of Lloyd's surveyors, one of these pamphlets similar to Ex-

[fol. 481] hibit No. 16, and you were directed to proceed accordingly, were you not?

Mr. Keating: I object to the question for Mr. Jones has asked at least five questions in it, and I think the witness has only answered one. It is an unfair way to examine a witness. Make one question there.

The Court: Have you an answer to it? (To the stenographer.)

The Stenographer: There is no answer.

(The question is stricken out.)

Q. Did you or did you not receive an exact copy of Exhibit No. 16?

A. To the best of my recollection I did.

Q. Did you not receive instructions from your superiors in London to be guided by this copy of Exhibit No. 16 which you received?

A. I do not know.

Q. In the ordinary course of your operation are you or are you not guided by the documents similar to Exhibit 16 which are issued by your London superiors?

A. Yes, Mr. Jones, yes.

Q. And notwithstanding that fact, you would feel that you would disregard Mr. Milton's recommendation No. 5 contained in Exhibit No. 16?

A. That is not a fair question, sir; I cannot answer that question. At least one of Mr. Milton's recommendations is impossible, therefore I must only carry it out to the best of my practical judgment, as we do all our rules. The very word absolutely at once is impossible if you are going to hang on a word.

Q. Doors can be made water-tight, can't they?

A. Yes, sir.

[fol. 482] Q. Therefore they can be made air-tight?

A. I beg your pardon, I would like to qualify that; the type of door that I have sketched cannot be made water-tight.

Q. That is not the only type of door that you have used for bunkers, is it?

A. No, sir, but a water-tight door is only used when on a water-tight bulkhead.

Q. But it is entirely feasible to have a water-tight door, isn't it?

A. Of course, it is feasible; anything is feasible. It is a question of does the commercial practice warrant it. We can lock up poisonous gases and hold them absolutely safe, but we couldn't build ships that way, Mr. Jones.

Q. But you know that on cross bunkers on passenger ships you do have water-tight doors?

A. It depends on the passenger ship. You have them both on freighters and on passenger ships; it depends on the location of your water-tight bulkhead.

Q. You have then a bunker on both freight and passenger ships, not all bunkers and not all ships, but you have seen water-tight doors to bunkers on both freight and passenger ships?

A. Yes, sir.

By the Court:

Q. Water-tight doors to bunkers?

A. Where the bunker bulkhead is water-tight the bulkhead of the ship, those water-tight doors are fitted; when it is not the water-tight bunker of a ship those water-tight doors are not fitted.

By Mr. Jones:

Q. I show you Lloyds Calendar for 1926, which is printed and published by Lloyds Royal Exchange, London, in [fol. 483] 1926——

A. Incidentally, I have nothing to do with Lloyds Exchange, Mr. Jones; I am Lloyds Register.

Q. —and ask you whether or not Mr. Milton's recommendations are not published in Lloyds Calendar as shown there?

The Court: He has already stated this.

Mr. Jones: I would like to have it marked for identification.

The Witness: I can admit it is in 1929.

Q. And it goes back to 1912?

A. Yes, sir.

Q. Ever since Mr. Milton made his report?

A. Yes.

Q. And I believe you told me that this Calendar is in common circulation among all shipping men?

A. Oh, yes, a very well-known work.

Mr. Jones: It is considered a standard work?

(Lloyds Calendar, the last exhibit offered, is marked exhibit No. 26, of this date.)

Q. Now I notice on Mr. Milton's report as printed on the side in black type: "In recent cases length of voyage does not appear to be an important factor." Do you agree or disagree with that statement?

A. Well, he is referring to those particular cases; I don't know the cases that he had in mind, sir, so I cannot agree nor disagree.

Q. You wouldn't advance the opinion that the length of the voyage has anything to do with it?

A. Oh, yes, Mr. Milton said that himself in the last paragraph, that the longer the coal remains in the bunker, the [fol. 484] greater the danger, in his conclusions. He says it cannot be too strongly impressed on the engineers, and then it goes on.

The Court: I want to ask a question which you will think objectionable, so I note an exception in your behalf to it.

By the Court:

Q. About what percentage of the steamships have one of the bulkheads made of wood?

A. I couldn't answer that, sir. During the war there was a large number, a great many have been removed. Now I am speaking more particularly of the lower bunker.

Q. A great many have been removed because they were considered unsafe?

A. No, not because it was considered unsafe.

Q. Well, why did they go to the trouble and expense of removing the bulkhead and putting in a steel one?

A. Because in those days they had to carry a large amount of bunkers; this wasn't an extra one. Most of the American ships enlarged their bunkers during the war; they couldn't get coal on the other side, for the round trip, and they extended the bulkhead. Practically all the American coal-burning ships did that. And as to between decks here, I think I already stated to Mr. Keating that I think most large coal-burning freighters on long voyages have a similar arrangement.

Q. On long voyages—to South America, South Africa?

A. No, your Honor, longer than that; South Africa would be longer, but I have in mind the Far East.

[fol. 485] By Mr. Jones:

Q. Would you consider a voyage of two months a long voyage?

A. No, sir, I would consider that a moderate voyage.

Q. How long does a voyage to South Africa take?

A. About three weeks.

Q. You consider a three weeks' voyage to South Africa a long voyage, but not a three months' voyage?

A. I had in mind the round trip to South Africa, Mr. Jones, I didn't mean the one single voyage.

Q. I show you Exhibit No. 18, which is apparently the original arrangement of the ship, and ask you if this bulkhead which has been described to you by Mr. Keating appears on this exhibit?

A. There is a rough pencil mark here which I took for the bulkhead; it isn't on the original plan, but somebody has added it since.

Q. I then put the letter A at the top of the pencil mark and the letter B at the bottom, that is roughly in the place that Mr. Keating described, isn't it?

A. I don't know; Mr. Keating didn't describe it. I couldn't take the responsibility for saying it.

Q. You don't want this thing to be here at all, so I prefer to rub it out.

A. There must be some testimony as to where that bulkhead is.

Q. There is. Mr. Bagger showed definitely that he measured it and Mr. Bagger's testimony shows that it is between the 25th and 20th frame space, beginning from the boiler room bulkhead, which is marked frame 100, so it would be 125.

A. It would be 124.

Q. It was just abaft the ventilator?

A. Yes.

Q. That is in the upper between decks?

[fol. 486] A. The upper between decks or the shelter between decks.

Q. The shelter between decks, just abaft the ventilator?

A. On both decks.

Q. Now, on what they call the shelter deck space, what we call the upper between deck, and those in the lower between decks, which the ship's officer called the between decks, it is just forward of the twentieth frame or the one hundred and twentieth frame?

Mr. Jones: The witness has marked on the ship's plan two pencil marks, one in the shelter deck, where I put the letter A at the top of the line, and the letter B at the bottom; one in the between deck, I put the letter C at the top of the line and the letter D at the bottom of the line, which indicate the position of the wooden bulkheads at the forward end of the shelter deck and between deck spaces, respectively.

(These positions have been described to the witness by Mr. Jones from Mr. Bagger's sketch.)

Q. Now I ask you whether you have any record of your Society having approved those compartments with those two wooden bulkheads, the bulkhead A-B and C-D being inserted in the ship?

A. No, Lloyds Register would not pass on the position of that; that would be a question for the owner.

Q. You have nothing to do with that?

A. No, sir.

Q. Now, as I recall it, it has been testified here that this was a permanent bulkhead, and isn't it true that any per-
[fol. 487] manent change in the ship's structure must be called to your classification company's attention?

A. No, sir, that would be only anything involving the strength of the ship or her safety.

Q. Insertion of a bulkhead such as that affects the ventilating arrangement of the ship, doesn't it?

A. It probably would, yes, sir, it probably would.

Q. And it is your Society's duty to take cognizance of the ventilating arrangements of the holds, isn't that true?

A. To a certain extent, yes.

By the Court:

Q. Can you tell me, Mr. Heck, anything—this over the objection of the libelant—anything about the custom of closing the openings under the sills that support such a

wooden bulkhead as this? Do you understand what I mean by the sills?

A. Oh, yes.

Q. Now, you told me that normally there would be openings under them?

A. Yes, sir.

Q. Can you tell me anything about the custom in regard to filling up those openings?

A. In many cases it varies so much, your Honor, and in some cases they do not fill those up at all. In some cases a very careful ship owner will bolt them down and fit them down so there aren't any openings, and in some cases the openings will get plugged with dirt.

Q. Mere bolting down wouldn't be sufficient, would it? It wouldn't have any effect whatever, would it?

A. Bolting down, on red lead and putty, we make a paste with putty, if we desire to keep it very tight, and we can stop anything then.

[fol. 488] By Mr. Jones:

Q. It merely takes a little trouble to make it tight?

A. It all depends. We all vary, Mr. Jones. Some examiners are very easy and you have been very hard.

The Court: I don't think he has worried you an awful lot, Mr. Heck.

Mr. Jones: Mr. Heck evidently thinks I am a bad man. I simply call to your attention only what is recommended by your own Society in print, and you have taken exception to the recommendations of your own Society.

Adjourned to Tuesday, November 12, 1929, at 10:30 A. M.

New York, November 12, 1929.

Met pursuant to adjournment at 10:30 A. M. Present: As before.

HARRY A. HUFF, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Huff, by whom are you employed?

A. Board of Underwriters of New York.

Q. And who are the Board of Underwriters of New York?

A. They are comprised of the chief marine insurance companies.

Q. Cargo insurance companies?

A. Cargo.

[fol. 489] Mr. Jones: I would like to cross examine this witness. I don't think he knows who the Board of Underwriters are. I think I know more than he does.

The Court: You may cross examine him just as soon as he is qualified and before he gives the substance of his testimony.

Q. Captain, how long have you been employed by the Board of Underwriters?

A. About five years and a half.

Q. In what capacity are you employed?

A. Surveyor.

Q. And in the capacity as surveyor what do you do?

A. Inspect the cargo of the ships.

Q. In New York?

A. In New York and New Jersey, Staten Island, wherever I am sent.

Q. How many ships in the course of a year do you suppose you inspect?

A. Well, about 50 a month. That would be about 600.

Q. A year?

A. A year.

Q. And you have been doing that for five years?

A. Yes.

Q. Now, will you state, Captain, what your experience and training was prior to your having become a surveyor for the New York Board of Underwriters?

A. Well, I have been a seaman, an officer and master, in both steam and sail.

Q. Do you hold an American master's license?

A. I do.

Q. How long have you held that license, approximately?

A. About 25 years.

Q. And you have actually been in command of ships?

A. About 20 years.

Q. What lines did you act as master for?

A. The Ward Line, and the Mallory Transportation Line, as master.

[fol. 490] Q. And prior to that you had worked yourself up to master?

A. I worked myself in the Ward Line.

Q. How old are you?

A. 57.

Q. Captain, as a surveyor for the New York Board of Underwriters, were you given any instructions and told what your duties were?

A. Outside of surveying the ships, that is all; living up to the rules of the Board.

Q. They have printed rules, have they not?

A. They have.

Q. And do you make reports of each survey that you make?

A. We do.

Q. Captain, did you go aboard the "Galileo" in August, 1926?

A. I did.

Q. Have you some notes so that you can tell me what date it was you first went on board?

A. My pass book shows that I went on board of her on August 23rd.

Q. What year?

A. 1926, and issued a pass. The time was 11:30 A. M.

Q. That was 11:30 A. M. that you went on board the "Galileo" on August 23rd?

A. 23rd, 1926.

Q. You actually, physically, went on board the vessel?

A. I did.

Q. And when you got aboard the vessel, what did you do?

A. I inspected the cargo holds.

Q. All of them?

A. All of them.

Q. Did you go down into No. 2 tween decks?

A. Yes.

Q. Did you see the wooden bulkhead which separated No. 2 tween decks from No. 3 tween decks?

A. Yes.

Q. Did you make any inspection of that bulkhead?

A. I did.

[fol. 491] Q. Did you know any coal was on the other side?

A. I knew that coal was there, and was going to be put aboard.

Q. Do you recall what the bulkhead looked like?

A. It was a wooden bulkhead. As well as I can remember, it was about 3-inch planks running up and down.

Q. And how wide were the planks, if you remember them?

A. Planks are usually around 10 inches. I couldn't remember now, but I should say around 10 inches thick.

Q. What else did you see about the bulkhead, Captain?

A. Well, they had over the cracks—as near as I can remember, they were sheathed with slats or battens.

Q. How were they fastened to the bulkhead?

A. Nailed on.

Q. One of those over each crack?

A. Yes.

Q. What else did you see about the bulkhead, Captain?

A. I think—yes, I am sure—that there was what they called a separation cloth over the bulkhead.

Q. Where was that?

A. That was on the forward side of the wooden bulkhead.

Q. No. 2 tween decks?

A. Yes.

By the Court:

Q. How could you ever see the battens if the cloth was there?

A. This cloth is over the battens, but you could always feel those battens underneath, and why I was so anxious about this bulkhead was on account of the cargo that she had in there, and she also had a magazine, and I was anxious to be sure that the bulkhead would be strong.

[fol. 492] The Court: That is what is sometimes known as the lower tween deck?

The Witness: The lower tween deck, and the shelter deck.

By Mr. Keating:

Q. You looked at both bulkheads?

A. Yes.

By the Court:

Q. Did you go into No. 3 at all?

A. No. 3 is where the coal was, you know.

Q. Yes.

A. No, I don't remember going down where the coal was.

Q. I am not sure just what you did. You went down and looked at this bulkhead, which is covered over with a separation cloth?

A. Yes.

Q. And you say you felt some of the battens?

A. Yes.

Q. You couldn't feel them all?

A. I couldn't feel everything, but I was satisfied.

Q. What does that mean, you were satisfied?

A. As long as the cloth was there, it would keep the dust from coming in on the cargo.

Q. That was the only thing in which you were interested?

A. Yes.

Q. Just the dust?

A. Yes, to protect the cargo that was in No. 2.

By Mr. Keating:

Q. Your interest in the bulkhead was that it would be dust-proof and strong?

A. Dust-proof and strong.

Q. You had two things in mind: Strength and its ability to resist dust?

A. Yes.

[fol. 493] Q. Were you there before cargo was put in No. 2?

A. I was.

Q. How many times were you on the ship?

A. Well, I was there up until she sailed, every day.

Q. Captain, from your experience as a surveyor and as a master, will you tell us whether or not in the Port of New York and elsewhere it is usual to carry coal in a compartment which is separated from another compartment by a wooden bulkhead such as you have described and saw on this vessel?

Mr. Jones: That is subject to the objection I have noted to this question wherever it is propounded.

The Court: Overruled.

A. It is customary in the Port of New York.

Q. Can you give us an approximate idea of how many vessels you have seen carrying coal in similar spaces to this?

A. You mean as long as I have been on shore or going to sea?

Q. As long as you have been going to sea.

A. I would say 100 vessels, more or less. I couldn't say any number, you know. I never kept an account of the number.

Q. Have you seen any lately, Captain?

A. Yes, but I don't recall the ship.

Q. Would you turn down the stowage of a ship that carried coal in such a compartment against a wooden bulkhead, in which cargo you were interested in was carried?

Mr. Jones: I object to that.

The Court: I sustain the objection on the ground of the competency of the objection.

[fol. 494] Q. Captain, as a result of your inspection, did the New York Board of Underwriters issue a certificate?

A. It did.

Q. Is this the certificate? (Handing paper to witness.)

Mr. Jones: May I see the certificate?

The Witness: That is my signature.

Mr. Keating: I ask that it be marked in evidence.

Mr. Jones: It isn't a statement of the Board of Underwriters; it is a certificate of the Underwriters. You are referring to it as a certificate of the Board.

Q. Is this your certificate or a certificate of the Board of Underwriters?

Mr. Jones: I object to it as calling for a conclusion.

The Court: I will sustain the objection.

Q. Captain Huff, does the Board of Underwriters of New York issue a certificate over the surveyor's signature or over any signature?

A. Over my signature.

Mr. Jones: I object. The certificate is here.

The Court: I overrule your objection and give you an exception.

He says, as I understand him, that the general custom is to issue, that is, for the Board of Underwriters to issue certificates over the surveyor's signature. Do you want to dispute that?

Mr. Jones: I will. I know very well that is not so.

[fol. 495] Q. Did you have authority from the New York Board of Underwriters to issue this certificate?

Mr. Jones: I object. The surveyor issues his certificate, and your Honor will find that in the certificate itself the following language is contained:

"This certificate is issued on the conditions that while the officers and committees of the Board use their best endeavors to insure that the functions of the Board are properly executed, neither such officers nor such committees, nor the Board are under any circumstances whatever to be held responsible for any inaccuracy in any report or certificate issued by the Board of its surveyors, or for any error of judgment, default, or negligence of the surveyors or other employees or representatives of the Board."

Mr. Keating: They simply don't want to be sued. That has no bearing on the question of whether this is the Board's certificate or the surveyor's. I asked him if he had authority from the Board——

The Court: Is it to be marked in evidence?

Mr. Jones: I ask that it be marked in evidence.

Mr. Keating: No objection.

(Marked Exhibit M in evidence of this date.)

The Court: You may inquire as much as you want as to the custom of trade and custom of issuing the certificates.

[fol. 496] By Mr. Keating:

Q. Will you state to his Honor, Captain Huff, what the practice and custom is about the issuing of these certificates, such as Exhibit M marked in evidence?

A. Well, we visit the ship and issue a pass.

Q. What does that mean?

A. That the ship is in condition to load.

Q. Load cargo?

A. Load cargo.

By the Court:

Q. Who do you issue that to?

A. We issue that to the ship.

Q. Hand it to the master?

A. Usually hand it to the superintendent on the dock.

Q. Pier superintendent?

A. Pier superintendent, and then we visit the ship, well, every day, once every day; sometimes, if it is necessary, we visit it twice a day. It all depends on the cargo they are taking, and whether we consider it necessary to visit more than once. When the ship is finished loading we issue the certificate that it is loaded.

Q. Do you give that to the superintendent of the pier also?

A. That is usually sent to the office.

Q. Office of the agent?

A. Of the agents.

Q. Is there any other type of certificate, other than the one which we have in evidence, that is issued by your Board?

A. None that I know of.

By Mr. Keating:

Q. Captain, has the New York Board of Underwriters any connection with any steamship company?

A. Just what do you mean by that?

[fol. 497] Q. I mean, are they employed by any steamship company or is it an independent organization?

A. Well, the steamship company pays for the certificate.

Q. They pay a fee?

A. Yes.

Q. But have they any interest in the New York Board of Underwriters?

A. Which, the steamship company?

Mr. Jones: If he knows.

Q. If you know.

A. No, not that I know of.

Q. Now, Captain, in your experience as a master have you carried coal?

A. Yes.

Q. Did you ever carry it behind wooden bulkheads?

A. I have.

Q. How many times did you do that?

A. Well, the last three voyages, before I stopped going to sea and came ashore, I carried coal on one side, cargo on the other—voyages out to East Africa, South Africa and Mauritius.

Q. In that trade, can you say whether or not it is usual and customary for their ships to carry coal behind wooden bulkheads?

A. Yes, it was.

Cross-examination.

By Mr. Jones:

Q. Capt. Huff, do you know whether the Board of Underwriters of New York is a corporation?

A. Whether it is?

Q. Whether it is a corporation?

A. No.

Q. As a matter of fact, you don't know anything about the organization of the Board, do you?

A. No, I don't. I am only interested in surveying.

Q. So you don't know anything about who has any proprietary interest in the Board of Underwriters of New York, do you?

A. If——

[fol. 498] Q. If you don't know——

A. I don't quite understand that question.

Q. Well, you know what a stockholder is?

A. Sure.

Q. Do you know whether or not there are stockholders in the Board of Underwriters of New York?

A. It——

The Court: Do you or don't you know? If you don't know, say no.

The Witness: All I know is——

Q. I said, do you know whether or not there are any stockholders in the Board of Underwriters of New York?

A. No, I do not.

Q. You don't know anything about the corporate organization?

A. No.

Q. You don't know whether it is a corporation or not a corporation?

A. No.

Mr. Jones: I move to strike out any evidence this witness has given as to what the Board of Underwriters is. This witness doesn't know.

The Court: Strike it out.

Q. Now, Capt. Huff, I show you Exhibit M, and I ask you if you ever saw any certificate which you issued, or any other surveyor of the Board of Underwriters of New York issued, that was issued in any different form than this one?

A. No, I did not; no, sir, no difference. They all look alike to me.

Q. Did you ever see one that was signed by the Board of Underwriters at the bottom?

A. Well, formerly they were signed by the Assistant Secretary too.

[fol. 499] Q. How long ago was that?

A. Well, I don't remember just how long ago it is. Three or four years; I don't remember.

Q. But at the time this was issued, and some time prior to the time that Exhibit M was issued, you had never seen any certificate which was other than the certificate signed by the surveyor alone, with reference to the Board of Underwriters, over the signature of the surveyor; that is correct, isn't it?

A. That is the only kind of certificate, with the exception of the other one that I spoke of, that was signed by the Assisstant Secretary.

Q. You don't know how he signed his name?

A. No; he was the Assistant Secretary then.

Q. Isn't it a fact that you went aboard this ship largely for the purpose of inspecting the ship with respect to the grain cargo she was to carry?

A. Grain and general.

Q. And you were principally interested in seeing whether the holds where the grain was to be stowed were grain tight?

A. Yes.

Q. And the grain was bulk grain?

A. Bulk grain.

Q. And that had to be carried in the lower holds?

A. Yes.

Q. The rules so require?

A. Yes.

Q. And those rules are approved by the British Board of Trade? You know that?

A. Yes.

Q. And any ship carrying bulk grain to Great Britain has to be loaded in accordance with the rules of the Board of Underwriters of New York, and in accordance with the provisions of the British Board of Trade; that is true, isn't it?

A. Yes.

Q. And you were principally interested in seeing that [fol. 500] those grain holds were grain-tight, isn't that it?

A. What do you mean by grain-tight?

Q. Well, now, Captain Huff, you have an illustrated set of rules with respest to loading grain?

A. Yes.

Q. Have you that with you?

A. No—I think I have.

Q. I know the pamphlet quite well.

A. I haven't got it with me.

Q. That looks as though it might be it.

A. This is the new rules that have come out since it came out last—yes.

Q. They are the new rules for the loading of grain?

A. Very little difference.

Q. We can have a copy of the old rules which were in existence at the time this ship was loaded can't we?

A. I think so.

Q. Now, I see here this rule: "All feeders must be grain-tight. Steamer with lower 'tween decks must have hatchway feeders; and if the distance in the lower holds between the forward bulkhead and the nearest end of the hatchway feeder exceeds 25 feet (25-) (unless in the opinion of the surveyor, the distance should be less), then the vessel must have a wing feeder on each side and bolts in the 'tween decks to fit this space." The heading of that paragraph is "All feeders must be grain-tight." That is an absolute regulation, isn't it?

A. That is.

Q. And have to be very tight to be grain-tight?

A. Yes.

Q. You couldn't load bulk grain in the 'tween decks, could you?

A. You can't load bulk grain between the two upper decks. If that ship had a 'tween deck I could load.

Q. But you had to load the grain in the lower holds of [fol. 501] that ship?

A. We could load it in the 'tween decks too.

Q. Don't your rules requires that your holds be loaded if you are going to be loaded?

A. Why——

Mr. Keating: I think the witness ought to be allowed to finish his answer.

A. (Continued.) The rules say you can. That is a very big ship, and I can load grain in the lower hold and in the tween deck, but you can't load bulk grain in the upper deck.

The Court: Why?

The Witness: On account it is too high up and if it should shift, it would give the ship a list and make it dangerous. The higher up the grain——

By the Court:

Q. That is the only reason?

A. That is the only reason. It is less risk than you have in bags in the tween decks.

By Mr. Keating:

Q. It is dangerous to load bulk grain in the tween decks, isn't it?

A. Between the two upper decks, yes.

Q. And it makes the construction of level shifting boards in the tween decks necessary?

A. Yes.

Q. You never received any authority in writing from anybody from the Board of Underwriters of New York?

A. Authority about what?

[fol. 502] Q. Authorizing you to do anything in the name of the Board of Underwriters?

A. Outside of inspecting the ship, no.

Q. And you got your orders from your superior officer, Capt. Evans to go out and inspect a ship?

A. Yes.

Q. And I take it you were simply interested in the cargo of this vessel. You had no interest in the coal or in the

ship's management, had nothing to do with it, isn't that so?

A. As long as she is safe and seaworthy.

Q. You didn't go and look at her engines?

A. No.

Q. And you didn't go into her bunkers?

A. No.

Q. It is none of your business, is it?

A. No.

Q. Isn't it a fact that your steamship company pays for this service?

A. They do for the certificate, yes.

Q. With respect to this wooden bulkhead, as I take it from what you said to his Honor, you never saw the bulkhead at all; all you saw were the separation cloths which were draped over the bulkhead?

A. Yes, from the forward side.

Q. So that I am certain that I understand what you mean to tell us, I will say what I understand you to have said: You went into No. 2 tween decks?

A. Yes.

Q. And you saw, at the after end of that space, a cloth had been draped over a bulkhead?

A. Yes.

Q. And then you went and felt that cloth and felt battens under the cloth?

A. Yes, and felt around the planks too.

Q. So that is all you know about it?

A. Yes.

Q. And you were interested to see that these cargo separation cloths were there?

A. Yes.

Q. You felt it was necessary for them to be there, didn't you?

A. Yes.

[fol. 503] Q. And from your feeling of the bulkhead you felt, without the cargo separation cloths being there, that dust would come through from the coal to the cargo?

A. No, they had the battens there. I think the separation cloths were an extra precaution.

Q. Why were you interested in the separation cloths?

A. I was interested—it was put up there before I got there.

Q. You didn't know anything about the bulkhead itself, as far as this feeling in a few places, as to the character of the bulkhead?

A. I satisfied myself as to the strength of it.

Q. But as to the tightness of it you didn't know?

A. I was satisfying myself as to the tightness, or I wouldn't issue a pass.

Q. What area did you feel?

A. I felt across the whole width of the ship.

Q. Did you feel every batten?

A. No.

Q. How many did you feel?

A. I don't know.

Q. Did you feel as many as five?

A. Yes.

Q. As many as six?

A. Yes.

Q. As many as seven?

A. Yes.

Q. As many as eight?

A. Yes.

Q. How many did you feel? Give us the maximum number that you felt.

A. I couldn't say. I can't recall how many. That is one ship out of 1800.

Q. Exactly. So, as a matter of fact, you relied upon that separation cloth and the general impression which you got, that the bulkhead was strong, for the purpose of reaching your conclusion that it was dust-tight?

A. Yes, I was satisfied with the bulkhead.

Q. And you in fact relied more on the separation cloth than you did upon the bulkhead?

A. No, I would rely upon the battens.

[fol. 504] Q. How could you rely upon the battens if you didn't see them?

A. If the separation cloth wasn't there I would have seen every batten, but without seeing them all and the separation cloth, then I was satisfied they were dust-proof.

Q. Then the point is, you did rely upon the separation cloth, didn't you?

A. Yes.

Q. You were not asked to inspect and pass upon the stowage of coal, were you?

A. No.

Q. Then your certificate has nothing to do with the coal, has it?

A. No, not unless it was cargo. If they don't put it on the certificate, then we won't.

Q. You didn't know coal was cargo or not, did you?

A. No, I didn't.

Q. But you never went in the compartment where the coal was stowed?

A. No.

Q. No one told you it was cargo?

A. No.

Q. So it was bunker?

A. It didn't make any difference to me whether it was bunker—it is all coal.

(Witness excused.)

ROBERT H. LAVERIE, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Laverie, what is your business?

A. Marine surveyor.

Q. By whom are you employed, Mr. Laverie?

A. I have my own business as R. H. Laverie & Son, marine surveying business, and I am personally chief surveyor to the Bureau Veritas, International Register of Shipping.

[fol. 505] Q. What is the Bureau Veritas, Mr. Laverie?

A. The equivalent of the American Bureau of Shipping, Lloyds Register of Shipping, excepting that it might be classed as the largest international society and the oldest classification society.

Q. Has it anything to do with ship owners as such?

A. No, sir.

By the Court:

Q. What position did you hold with that Bureau?
A. Chief surveyor for the United States and Canada.

By Mr. Keating:

Q. Mr. Laverie, will you state generally your experience which led up to your becoming chief surveyor to the Bureau Veritas?

A. I completed my training as ship builder and engineer with my father in Quebec, in Canada; he was general manager, G. T. Davis Shipbuilding Company at Quebec. Following which I was working as a ship fitter at the American Steel Bridge Company, at West Superior. From there I went to Cramp's Shipyard, Newport Shipbuilding Company, the Harris Company at Bristol, the Fore River Shipbuilding Company, at East Braintree; following which I came to the Cross Shipyard at Elizabeth, and thereafter to Downes & Downes Shipbuilding Company at Shooter Island, New York Harbor. In 1908 I started my consulting business, and in 1910 was appointed to the Bureau Veritas.

Q. As Chief surveyor?
A. As chief surveyor.
Q. And have been since 1910?
A. Yes, sir.

Q. Mr. Laverie, in your capacity as chief surveyor to the Bureau Veritas have you had occasion to inspect a large [fol. 506] number of vessels?

A. Yes, sir.

Q. How many do you suppose you personally inspect in the course of a year?

A. Well, during the last two years the number of ships were diminishing, and my office work prevented me from the actual inspection of ships. Previous to that, both in my capacity as chief surveyor and in my capacity as private surveyor, I have surveyed a great many vessels.

Q. Does it run into hundreds?
A. Oh, yes, sir.
Q. Thousands?
A. I wouldn't say thousands—hundreds.

Q. Will you state, Mr. Laverie, from your experience as a surveyor whether or not it is usual and customary to carry bunker coal in a compartment which is separated

from another compartment by a wooden bulkhead which is not air-tight?

A. Yes, sir.

Q. In your experience how many vessels have you seen carrying coal against wooden bulkheads that weren't air-tight?

A. Probably 25 or 30.

Q. Have you seen any recently?

A. I have inspected the steamer "St. Quentin" on Monday for damage to the steel transverse beam of such a wooden bulkhead.

Q. Was she carrying coal against the wooden bulkhead?

A. Yes, sir.

By the Court:

Q. How was that bulkhead made?

A. Vertically planked with the steel beam angle bracketed to the ship's side with steel brackets at about 10 feet height from the ceiling.

[fol. 507] Q. How were the planks joined together?

A. Just seamed and battened.

Q. Battened?

A. Yes, sir.

By Mr. Keating:

Q. What kind of battens do you mean, Mr. Laverie?

A. About a 3 or 4 inch batten, and a half inch thick.

Q. On either side?

A. On the cargo side.

Q. Have anything else besides the battens?

A. No, sir.

Q. Not on that side?

A. Not on that side.

Q. Mr. Laverie, are you familiar, from your experience in shipbuilding and as chief surveyor to the Bureau Veritas, with ships' bunkers?

A. Yes, sir.

Q. I don't mean the coal. I mean the actual ship's bunkers?

A. Yes, sir.

Q. Is the usual ship's bunker air-tight?

A. No, sir.

Q. Will you describe the ordinary ship's bunker to his Honor with respect to why it isn't air-tight?

Mr. Jones: I object to the question. Describe the ship's bulkhead, why it isn't air-tight. The question calls for a conclusion.

The Court: I will overrule your objection and give you an exception.

A. The strength beams of the vessel pass through the bunker casings in almost all vessels and the deck beams pass through. Where they pass through, a much larger opening is made in the bunker side plating, following which [fol. 508] a plate collar is fitted as tightly as it can be fitted to prevent the coal, the small coal, from coming through, but invariably, particularly in the fire room, no attempt is made to have it absolutely tight.

The Court: Those openings would be mostly high up, above the coal.

The Witness: They would start at the 'tween deck level, then the bunker doors are ordinary sliding doors to keep coal from running in on the fire room floor, and aren't tight, and are seldom closed.

Cross-examination.

By Mr. Jones:

Q. As I understand you, those beams which you have told us about are beams that would run on the top of the bunker or lower down in the ship?

A. Strong beams are fitted sometimes between the engine room and boiler room.

Q. Now I think we are talking at cross purposes. The bottom of the bunker I will call the floor in order not to have any misunderstanding between us, and the top of the bunker I will call the roof, so that we won't have any misunderstanding. Now, this beam which you have described is riveted right underneath the roof and not on the floor of the bunker?

A. Yes, sir.

Q. So that wouldn't run through the pile of coal itself?

A. No, sir.

Q. And any air that would admit would be admitted to the surface of the coal and not to the bottom of the coal?

A. Excepting that you have two and sometimes three decks passing through your coal bunker. In other words, when you speak of the roof and floor, they would be two and sometimes three stories below deck level.

[fol. 509] Q. That is a very unusual bunker to have, a bunker that has a very deep hold such as you have described now?

A. No, sir.

Q. That is a common type of bunker?

A. Where you have a shelter deck, a 'tween deck, and you have two decks at least.

The Court: Don't those decks run through the bunker?

The Witness: Yes, sir, with small hatch openings to permit the coal to run down freely.

By Mr. Jones:

Q. So there would be an air space above the coal in each one of those pockets or bunkers?

A. Yes, in the corners.

Q. That is where the beam would be?

A. But when the bunker was entirely full of coal you would have air getting through those collars into the middle of the coal.

Q. On top of the coal?

A. Into the middle of your coal when your bunker was filled.

Q. Mr. Laverie, you don't mean that. So we can't have any mistake about what you have been saying, will you draw here what you mean by those bunkers which you have described?

A. This would be your lower bunkers, the 'tween deck bunkers, and in some cases your upper deck bunker.

Q. The lower bunker I mark with the letter A; the 'tween decks bunker I mark with the letter B, and the upper deck bunker I mark with the letter C. Now, where are those beams you told us about?

A. (Witness complies.)

[fol. 510] Q. Now, the beam which the witness has drawn I shade throughout its length, and I put the letter X at

one end and the letter Y at the other. Where is the other beam you are talking about?

A. Yes, sir. (Witness complies.)

Mr. Jones: I shade a beam and I put the letter T at one end and the letter S at the other.

Q. Any more beams?

A. The upper deck beam.

Mr. Jones: And the upper deck beam I shade and put the letter M at one end and the letter N at the other.

Q. Now, isn't it entirely obvious that any air that comes into that bunker comes into the top of the coal, that is, the bunker A?

A. Speaking of the lower bunker?

Q. Yes, isn't it entirely obvious that there is a steel water-tight, air-tight deck between bunker B and bunker A, except for the hatch that is there to let the coal run from one to the other?

A. On many occasions the deck plates are large openings without hatch coamings.

Q. They should have a hatch there?

A. The plate is left out entirely for the free flow of the coal to the lower bunkers.

Q. That I know is a negligent practice.

A. Not necessarily.

Q. I recall looking at Lloyds rules in connection with the steamer "Vestris", and I noticed that Lloyds rules had a specific requirement that where you had such bunkers you should have hatches and keep them tight, and you have a similar rule in your society?

[fol. 511] A. Where they are opening to a deck. You are speaking of a lower hatch opening; that it must be kept tight?

Q. Yes.

A. I don't think that other than strength deck was water-tight.

Q. But isn't deck XY a water-tight deck?

A. No.

Q. Isn't T-S a water-tight deck?

A. Yes.

Q. So any opening there must be tight?

A. Yes; not on the lower deck.

Q. Do you pile coal up to the bunker?

A. The coal ordinarily has free run from the upper deck down into the lower deck—into the lower bunker.

Q. So, now, let us take this X-Y, this beam is fastened to the side of the oval?

A. Yes, sir.

Q. But I suggested that any air could come into the side of the oval into the bunker?

A. I testified that it was where the beams passed through the bunker casings.

Q. That is quite easy to make that tight at the point X?

A. The beams don't pass through the oval at all.

Q. It is quite easy to make that tight, isn't it?

A. Yes, but it is never tight. The deck isn't tight to the deck plates. It isn't required.

Q. Who don't require it?

A. The classification rules of the Society.

Q. You say they don't require it?

A. Yes.

Q. It is quite easy to make this point tight at Y, if you want to?

A. Well, it is, but it is never done.

Q. And this point can be made tight?

A. Yes; it isn't the practice to do it.

Q. As a matter of fact, the amount of air that gets into the body of the coal, into this place in infinitesimal?

A. Comparatively; not forgetting the large opening of the bunker doors.

[fol. 512] Mr. Jones: I ask that the sketch be marked in evidence.

(Marked Libelant's Exhibit 27 in evidence.)

By the Court:

Q. About how large in square inches would these openings be in the given wall which ran over them up by either the beam or the collar?

A. Oh, comparatively small.

Q. Can you give me some idea?

A. Maybe an eighth of an inch surrounding the entire opening.

By Mr. Jones:

Q. Now, Mr. Laverie, these beams don't run through any bulkhead at all, do they, because they are athwartship beams?

A. They run through the fore and aft bunker casings.

Q. And that is a wall that forms a side of the bunker, isn't it?

A. Yes, sir.

Q. And I understood you to say to his Honor that the opening around the beam was only around one-eighth of an inch?

A. Yes, sir.

Q. Now, what are the sizes of these beams? Are they 6 inches high?

A. All the way from 12 to 6 inches, in the different hatches.

Q. They range from 12 to 6 inches in height?

A. Yes, sir.

Q. How wide are the beams?

A. 12 x 4—4 inch averages.

Q. Take this same sketch—I suppose it is an ordinary I-beam?

A. In some cases I-beams; sometimes channel.

[fol. 513] Q. Sketch out the type of beam.

A. (Witness complies.) That is a section of the beam.

Mr. Jones: I write the word "beam" there and shade the beam.

Q. That beam is made fast to the ship where?

A. At the side with a gusset.

Q. Show me where the rivets go through this beam?

A. At the ship's side?

Q. At the point Y. A. In the fitting of the plate—this dotted lines represents the opening—in order to permit free placing of the plate around the beam, the collar at that point is fitted as closely as it can be fitted in this fashion, with rivets. The plate is about at that point and the collar goes up and takes the same rivets, and that is made of two halves, fitted as snugly together as possible.

Q. So we can fully understand, at the place I put the figure 1, is what I will call the top of the collar, one corner of the top; the place where I put the figure 2 is the other

corner of the top; and figure 3 is one corner of the bottom, and figure 4 is another corner of the bottom?

A. Yes.

Q. That collar is then placed over the entire opening that was cut to permit the beam to go through?

A. Yes.

Q. And that collar that enclosed the space that was cut out, I marked the corners 5, 6, 7, and 8, so that that space is entirely closed, and the only space that is left is the crack around the edge of the beam.

A. Which is a sixteenth to an eighth of an inch.

Q. Now, this bunker which you have described is a bunker where all the sides of the bunker are made of steel?

A. Yes, sir.

[fol. 514] Redirect examination.

By Mr. Keating:

Q. And they make a water-tight compartment; water-tight bulkhead?

A. No, sir.

Q. Is the ordinary steel bulkhead water-tight and air-tight?

A. No, sir.

The Court: I note an exception to both sides. I want to ask some questions.

By the Court:

Q. What is the usual practice in the construction of permanent bunkers, in reference to the use of wooden bulkheads? Are they ever used?

A. They are. This particular vessel that I described——

Q. I don't want you to think on one particular vessel. I want to know from your general practice and surveying. I want to get an idea of about how usual it is to have wooden bulkheads on permanent bunkers. What percentage of cases have wooden bulkheads on permanent bunkers?

A. Well, I don't know that there is such a permanent rule. In other words, the requirements of temporary bulkheads are an everchanging one. If a vessel returning from a voyage has a longer voyage on this occasion than on

the last one, that bulkhead is moved forward to take more reservation, more bunker coal, so that the actual permanency of the wooden bulkhead is one of owner's convenience more than of classification and requirement.

Q. Well, there is such a thing as permanent bunkers in boats, isn't there, that aren't adjustable to size, and if the master needs more coal he has got to construct some kind of temporary bunker, is that true?

A. That is true.

[fol. 515] Q. Now considering the permanent bunkers: In what percentage of cases do you have wooden bulkheads on permanent bunkers?

A. Not very many.

Q. Rather unusual, isn't it?

A. Yes, I should say it is rather unusual.

Q. What would you think of the safety of that?

A. My experience has been one of having no hesitation in approving.

Q. It wouldn't be as safe as a steel bulkhead, would it?

A. It would. It has developed from the wooden ships, and we are building wooden ships yet, where you have wooden bulkheads carrying all kinds of cargoes.

Q. I mean with particular reference to the stowage of coal. Is a wooden bulkhead as safe as a steel bulkhead for the stowage of coal, generally speaking?

A. I wouldn't say. I would prefer a steel bulkhead, but I wouldn't hesitate to pass a wooden bulkhead.

Q. Now, as to various types of wooden bulkheads, is this batten construction that is used in this boat as safe as the other forms of wooden bulkheads?

A. Yes, sir, in my opinion.

Q. Wouldn't there be more considerable opportunity for air to go through a bulkhead constructed in this way than there would be if the bulkhead were caulked?

A. I never knew of a caulked bulkhead—a temporary bulkhead, fitted.

Q. What other method do they use to keep the air out?

A. I never knew of the question of air being considered. It was one of protecting the cargo. For instance, a paper cargo. They might take extra precautions by fitting additional paper over the seams before the battening was done. On some occasions they go to a greater extent and put on a

[fol. 516] sheath, solid sheath bulkhead over your strength bulkhead. Those are for extraordinary purposes.

Q. You have then considered the safety of wooden bulkheads mostly from the point of view from the safety of cargo being contaminated by coal dust, is that so?

A. That is the only consideration ordinarily given to it. The custom has been followed in the fitting of wooden bulkheads for reservation bunker purposes.

Q. You don't know anything about the dangers arising from coal generating heat—spontaneous combustion?

A. No, sir.

Q. You haven't considered bulkheads from that point of view at all?

A. No, sir, only from general practice.

Recross-examination.

By Mr. Jones:

Q. In other words, you have never studied the subject of spontaneous combustion?

A. I don't claim to be an expert.

Q. On the way coal is stowed?

A. No, sir.

Q. And you aren't expressing an opinion on that subject?

A. No, sir.

(Witness excused.)

Robert S. Haight, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Haight, what is your business?

A. Consulting marine engineer and ship's surveyor.

[fol. 517] Q. Will you state briefly what your experience has been which has led up to your present position?

A. I was graduated from Stevens Institute as a mechanical engineer in 1899. After that I served two years as a draftsman in shipyards; four years as assistant engineer on a steamship; four years at sea as engineer, after which

I came ashore and established myself in the present profession in New York.

Q. How long have you been a marine surveyor in New York?

A. Since 1909, that is 20 years ago.

Q. Mr. Haight, you were also a number of years surveyor for the Bureau Veritas, weren't you?

A. Yes, sir.

Q. Did you have a title with the Bureau Veritas?

A. Part of the time I was assistant chief inspector for the United States and Canada.

Q. Mr. Haight, have you made any special study of the measurement of cubic capacity of cargo vessels?

A. Yes, I have specialized in the measurement of cargo holds and cargo spaces.

Q. And in the course of your specialization, have you examined a small number of vessels?

A. No, a large number.

Q. Can you give me a rough idea of about how many, generally speaking?

A. Well, over a thousand. I should hesitate to say thousands. Certainly over a thousand.

Q. Will you state, Mr. Haight, from your experience in surveying this number of vessels, which you have mentioned, whether it is usual and customary to carry bunker coal in a space separated from another space by a wooden bulkhead, which is not air-tight?

A. Quite usual.

Mr. Jones: My associate tells me that I haven't reserved [fol. 518] my objection on all witnesses. I think Mr. Keating understands.

The Court: Yes. Furthermore, when either side prepares the record, if you find an exception isn't noted for the formal objection, it will be noted at any place, even if you haven't mentioned it. I will give each side every opportunity to test out the propriety of the rulings.

Q. Mr. Haight, I asked you to prepare a list of vessels which you had personally seen which carried coal in spaces similar to the "Galileo", against a wooden bulkhead. Have you prepared such a list?

A. Yes, a partial list.

Q. What do you mean by a partial list?

A. I went through the first three letters, A, B, C, in my ship file and took out each ship which carried coal in spaces similar to the "Galileo" against a wooden bulkhead. I didn't go all the way through the list because I don't think anything would be added by so doing.

Q. How many vessels had you seen?

The Court: Well, of course this is incompetent.

Mr. Jones: You can't prove custom by particular instances in a matter that may be brought out in cross examination.

The Court: I note an exception to the respondent.

Mr. Jones: No cross examination.

(Witness excused.)

[fol. 519] CHARLES E. ROSS, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Ross, what is your business?

A. Naval architect and engineer and surveyor.

Q. Will you state briefly what your qualifications are, Mr. Ross?

A. I was graduated from the University of Pennsylvania in 1888, taking the degree of Bachelor of Science. In 1889, Post-Graduate course, took the degree of Mechanical Engineer. Thereafter I went with the Rhode Shipyard, at Chester, Pennsylvania, in the drawing and construction department, and I was there a matter of ten years. At the end of that time I was in charge of machinery design and construction. Thereafter I went to the Morgan Iron Works in New York, and was superintendent in the matter of repairs and construction and operation. After that I joined with Mr. Henry Rodman, with offices at 117 State Street, as consulting engineer. After his death I joined with Mr. Frank S. Martin, and was with him until a matter of 8 or 10 years ago, when I opened my own office. Dur-

ing that period I have been interested in the construction, repair and maintenance of vessels of various types.

Q. Mr. Ross, in the course of your experience have you personally surveyed a large or small number of ships?

A. Quite a large number.

Q. Will you state whether or not from your experience it is customary and usual in the Port of New York for cargo vessels to carry coal in spaces similar to the "Galileo", as described to you, with coal on one side and cargo [fol. 520] on the other side of a wooden bulkhead which is not air-tight?

A. On coal burning ships it is quite customary.

Mr. Jones: No cross examination.

(Witness excused.)

C. L. Burke, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Burke, what is your business?

A. Marine surveyor and consulting engineer.

Q. Will you state what your experience has been which has led up to your present position?

A. For the past between six and seven years I have been with Mr. Charles E. Ross, and previous to that I was port engineer for the United American and American Hawaiian Lines, and ships around the coast. Previous to that I was chief engineer, to start, in the American Hawaiian Lines, on different ones of their vessels. Previous to that I had been with the Standard Oil Company of New York as chief engineer, and also different grades of engineer.

Q. How many years, Mr. Burke, had you served as chief engineer of coal-burning vessels?

A. From about 1907, chief engineer on part coal and part oil-burning vessels.

Q. What portion of that time was with coal-burning vessels?

A. Probably about equal.

Q. Prior to your being chief engineer on coal-burning vessels, had you served an apprenticeship up through the ranks?

A. Yes, sir.

[fol. 521] Q. How many years did you go to sea as a coal-burning engineer? I don't mean as a chief engineer, but as an engineer.

A. From 1901 or '02 I was an engineer.

Q. When you were the port engineer for the American Hawaiian and United American did you have supervision over the engineers?

A. Yes, sir.

Q. That was your job?

A. Yes, sir.

Q. Since you have been in private practice what has your experience been on the engineering, coal side?

A. You mean since I have been with Mr. Ross?

Q. Yes.

A. General.

Q. Were you here last night, Mr. Burke, when I read the two hypothetical questions?

A. Yes, sir.

Q. Do you remember them?

A. I can't say I remember all of it. I have a general idea, that is all.

Q. I show you the builder's plan of the steamer "Galileo", which is Exhibit 18, together with Exhibits 10, 11 and 12, being certain sketches of the steamer drawn approximately to scale, and ask you to assume the following facts:

1. That the steamship "Galileo" is a steel cargo vessel of about 4100 registered net tonnage, having three decks and six holds, each hold being divided into a lower hold, a tween deck and a shelter deck;

2. That No. 3 tween deck compartment, located on the tween deck forward of the permanent bunker space and aft of the No. 2 tween deck, is a compartment approximately 33 feet long, 50 feet wide and 10 feet high;

3. That the sides, bottom and top of No. 3 tween deck are steel, the forward end consisting of a bulkhead constructed [fol. 522] of planks about 10 inches wide and 3 inches thick running vertically from the top of the compartment to the floor and held in place or fitted into grooves composed of

sills or pieces of wood about 10 inches wide and about 6 inches high placed against the bottom and top of the bulkhead on each side; that the edges of each plank are planed and fitted closely together; that over each seam where the planks come together strips of wood or battens about 3 inches wide and about ¼ of an inch thick were nailed on both sides of the bulkhead, wire nails were used, the nails on each side of the batten being about one inch apart; that there were also made fast to the No. 2 tween deck side two or more separation cloths somewhat larger than an ordinary hatch tarpaulin, made of material somewhat similar to bagging, although heavier and of a closer texture, which were attached to the bulkhead at the top by placing a batten outside of the separation cloth and nailing it against the bulkhead; that where the separation cloths overlapped a batten was nailed vertically over the separation cloths against the bulkhead to join them together, the battens being similar to those used on the seams of the bulkhead; that this bulkhead ran to each side to the shell plating of the steamer;

4. That the after end of No. 3 tween deck consisted of a bulkhead made of steel in the way of the hatch hereinafter referred to; that this after bulkhead in the wings was constructed of planks of the same description as the forward bulkhead with battens nailed over the place on each side where the planks came together in the same way as battens [fol. 523] on the forward bulkhead, except that in the case of the after bulkhead the planks ran horizontally instead of vertically, that there were not any separation cloths attached to it and there was a door constructed in it on each side leading to the tween deck cross bunker; that through the top and bottom of this compartment, being the shelter and tween decks, respectively, was a hatchway located in the middle of the ship about 18 feet wide running forward from the steel bulkhead at the after end of the compartment approximately 15½ feet, thus making an opening approximately 15½ feet by 18 feet; that there was a grain feeder built of wood and full of grain running through the hatchways and through the compartment and built against the steel bulkhead extending from side to side of the hatchway and running from the hatchway forward less than half the length of the hatchway already described; that this No. 3

tween deck compartment is ventilated by two telescopic ventilators which are located on either side of the hatchway 6-7 feet out from the side of the hatchway and about 23 feet aft of the forward bulkhead; that the openings of these ventilators into this compartment were approximately 12 to 14 inches in diameter;

5. That No. 3 lower hold was filled with grain and the hatch over No. 3 tween deck was covered with hatches and that two tarpaulins were battened down over it.

Assuming all of these facts will you state whether or not No. 3 tween deck was a proper and safe compartment in which to load and carry coal?

A. It was.

Q. Mr. Burke, assume in addition to the facts contained [fol. 524] in the hypothetical question already stated to you the following facts:

1. That on August 25, 1926, there remained about 160 tons of coal out of 360 tons of Morrisdale coal which had been put into this No. 3 tween deck compartment on June 30, 1926, and that the 160 tons of coal which remained were in a pile against the forward bulkhead running up to within 3 feet of the top of the compartment and sloping aft to about 3 feet forward of the forward hatch coaming and slanting down from the sides of the ship to close to the sides of the hatch coaming.

2. That upon careful inspection by the Chief Engineer before loading any additional coal the 160 tons of coal remaining were found cool and showed no signs of heating, will you say whether or not it would be a safe and prudent thing to load an additional 160 tons of Morrisdale coal on top of the coal remaining since June 30th assuming that all the coal in No. 3 tween deck would be discharged from the steamer in 16 days, or shortly thereafter?

A. It would.

Q. Mr. Burke, assuming all the facts stated in both hypothetical questions, will you state whether or not it is usual and customary in the Port of New York to carry coal on other ships in similar places to the No. 3 tween deck, in the "Galileo", as described to you?

A. It is.

Q. Mr. Burke, are you familiar with the ordinary coal bunkers on ships, permanent bunkers, cross bunkers, and so forth?

A. I am.

Q. Are they air-tight?

A. Never any I have seen.

Q. What is the usual type of permanent coal bunker used [fol. 525] on a ship?

A. Well, one usual type is side bunkers. Another usual type is cross bunkers. Now, side bunkers—you want them described separately?

Q. No, that is all right. Now, are all the sides of those bunkers made of water-tight steel?

A. They are not. The steel is water-tight, but the workmanship is not.

Q. In your experience, what part of a bunker is ever water-tight?

A. What part of a bunker is water-tight?

Q. What part of a bunker is ever water-tight and air-tight?

A. I don't know of any.

Q. What about the case where one of the water-tight bulkhead forms part of the bunker?

A. That might be. That particular bulkhead might be water-tight except in the way of your door. The chances are the bulkhead next to your water-tight bulkhead wouldn't be water-tight.

Q. In other words, they don't put the water-tight bulkheads close together?

A. Not usually, except as it has been built as a combination deep tank and bunker.

Q. Where are the openings in the bunkers?

A. To the fire room?

Q. Yes, where are they?

A. In the bulkhead.

Q. What sort of opening?

A. It depends whether it is a water-tight bulkhead. If it is, it is fitted with a water-tight door; and then it may be fitted with an ordinary slide, or may merely be fitted with cleats—well, a batten for holding wood strips across—usually something to back up the coal.

Q. To keep——

A. To keep the coal from running out. Cleats are their usual construction in order to hold wood battens.

[fol. 526] Q. In your experience have you ever seen a water-tight door used in a bunker which hasn't a water-tight bulkhead?

A. No, sir, it would be of no use, because they have practically no door in it. The bulkheads are usually opening to another compartment, and the water-tight door would be of no use, sir.

Q. What about the bunkers in those single beam vessels? Are those bunkers air-tight?

A. No, sir.

Q. Why not?

A. They couldn't be. Their coal is lying on wood slatting, which is not usually caulked, just tightly laid, possibly stripped.

Q. Do you know what the purpose of ventilators is in a place where they carry coal?

A. The purpose of the ventilator usually is to keep fresh air in your bunker and to carry away your gas.

Q. Is it for surface ventilation?

A. It is for surface ventilation, to carry away the gas on the top.

Q. Any other purpose that you know of?

A. Not that I know of.

Q. What have you to say with reference to this particular bunker space on the "Galileo", with reference to its safety? If you have any views, I wish you would explain them and tell us why you think it is safe?

A. Well, it is a usual place to carry coal. Your coal is only piled, it isn't in a very deep pile, good dry space, two ventilators leading down to it.

Q. To the surface?

A. To the surface of it.

Q. Any proximity to heat?

A. No, sir.

Q. Is that one of the things an engineer on a vessel has to watch against?

A. Yes, sir. In fact, the only fires I had was in bunkers close to boilers.

[fol. 527] Q. And the heat from the boilers would heat the coal?

A. I have an idea that had a lot to do with it—between that and a hot pipe.

Q. Now, a telescopic ventilator would ventilate the bottom of a hold?

A. It would not.

Q. What would it ventilate?

A. The surface.

Q. The opening is in the top?

A. In the top.

Q. Any opening in the bottom?

A. No, sir.

Q. Mr. Burke, whose duty is it on a coal-burning steamer to inspect the coal?

A. The chief engineer's.

Q. Anybody else?

A. Well, it is usually left to the chief engineer and the first assistant, or sometimes the second assistant—usually takes another assistant along with him when he goes around.

Q. Now, if the coal is actually found to be hot is there any question but what it ought to come out.

A. Certainly. No question about that.

Q. No question about that?

A. No question about that.

Q. Would you consider the right thing to do would be to throw away any coal that has been in a ship two months?

A. To do what with it?

Q. Throw it away?

A. No, sir, not if it was in good condition. If heated, you could still save it, cool it, taking it out.

Q. Take it out of that space and cool it?

A. Cool it. It wouldn't be necessary to throw it away.

Q. Now, if the coal on inspection was perfectly cool, any objection you can see to putting new coal on it, provided all the coal that is put in this space is to come out in less than three weeks?

A. Not at all.

Q. What is the practice as to that on board steamer?

A. If your coal is in good condition with a pile of 6 or 7 feet you don't bother with it—up to 10 feet you wouldn't [fol. 528] bother with it—just load on top of it as it is.

Q. What is the practice about having a system on a ship to use up the old coal first? Would you approve of that?

A. Well, if you can do it you usually work your bunkers around. You can't always use the oldest coal first. You usually work your bunkers around so as not to leave them in too great a length of time, so you won't lose your heat units. If the coal gets old you can't get the heat units out of it.

Q. Mr. Burke, in your experience do you know whether all coal is subject to spontaneous combustion, new and old?

A. In my experience I think it all is.

Cross-examination.

By Mr. Jones:

Q. Mr. Burke, did you ever make a study of the spontaneous combustion of coal?

A. Sir?

Q. Mr. Burke, did you ever make a study of the spontaneous combustion of coal?

A. Not particularly, no, sir.

Q. You don't consider yourself an expert on the subject, however, do you?

A. Not an expert on combustion; not spontaneous combustion.

Q. Nor do you consider yourself qualified to say whether or not a particular pile of coal is likely to undergo spontaneous combustion?

A. That is all as far as ship's bunkers and studying is concerned.

Q. Let us get this straight. I don't want to talk at cross purposes with you. Do you consider yourself qualified to testify as to whether or not coal put into a ship's bunkers is likely to undergo spontaneous combustion?

[fol. 529] A. Most any coal you can put in a ship's bunker is liable to do it. You have to watch it.

Q. I think you have conceded that you aren't an expert on the subject.

A. No, I am not an expert. I said that.

Q. So you aren't qualified to testify that a given space on a ship is a safe place for coal to be stowed?

A. Oh, I am, as far as safe places on a ship are concerned.

Q. What is the difference between a safe place on a ship for the stowage of coal and a safe place on land for the stowage of coal?

A. What is the difference?

Q. Yes.

A. There is none.

Q. What elements do you think should be taken into consideration in determining whether or not a place is safe for the stowage of coal?

A. I don't——

Q. What factor should be taken into consideration to determine whether any given place, whether on land or on shipboard, is a safe place to stow coal?

A. On shipboard any place that is not too promiscuous, not adjacent to hot boilers or hot steam pipes, running along the bulkhead.

Q. Don't you know or do you know that the absorption of oxygen by coal is what causes spontaneous combustion?

A. I have read all the theory of it, that is all.

Q. I show you a steam boiler engineering publication by the Heine Safety Boiler Company. That is a recognized standard book, isn't it?

A. I believe it is.

Q. I call your attention to page 469 of this book, published in the year 1920, in which they say:

"According to the Bureau of Mines, the following precautions should be observed in storing coal: (1) Do not [fol. 530] pile in cones; pile evenly not over 12 feet, and so that any point in the interior will not be over 10 feet from an air cooled surface. (2) If possible, store only screened nut coal. (3) Keep out the dust as much as possible by reducing the handling to a minimum. (4) Pile so that lump and fine sizes are distributed evenly, not allowing lumps to roll to the bottom and form air passages. (5) Rehandle and screen after two months. (6) Do not store near outside heat sources, even though moderate in degree. (7) After mining, allow six weeks' seasoning before storing. (8) Avoid alternate wetting and drying. (9) Prevent air reaching the interior of the pile by avoiding interstices around timbers and brickwork, or through porous bottoms, such as coarse cinders. (10) Do not attempt to ventilate with pipes as they may do more harm than good."

Do you agree that those precautions should be taken?

A. Those are good theoretical precautions, but if you had to take them on a steamship, they would have to become all oil-burners.

Q. They are all practical precautions?

A. All tests taken, but not on a ship, however.

Q. I show you a pamphlet called Factors in the Spontaneous Combustion of Coal, by O. P. Hood, published by the Bureau of Mines, Department of the Interior, Washington, Government Printing Office, 1922, and I ask you if that is regarded as a standard work on the subject?

A. I believe that probably would be right. Different tests have ben taken——

Q. Now the conclusion reached in this pamphlet by the Government is this, at page 8, under the heading, "Access of Oxygen—Ventilation: There are many more factors of minor importance——"

[fol. 531] The Court: What is the use of reading?

Mr. Jones: I will tell the witness that the conclusion reached by the Government——

Mr. Keating: I object to this statement of the conclusion reached by the Government.

The Court: Will you state what the conclusion is?

Mr. Keating: This publication, if your Honor please, has entirely to do with tremendous piles of coal on land, and coal piles of this size on land—two and three thousand tons of coal—and Mr. Jones is trying to read all these miscellaneous pamphlets into the record.

Mr. Jones: I offer it in evidence, and there is no distinction.

Mr. Keating: I object.

Mr. Jones: I am cross examining the witness and I am certain——

Mr. Keating: Mr. Jones is trying to read all this into the record. This isn't cross examination at all; it is an attempt to get this pamphlet before this Court.

Mr. Jones: If your Honor please, I think it is clear that all the authorities on the subject, everybody who has given it any consideration at all, have all come to this one conclusion: that through ventilation, absorption of oxygen, is what causes these fires, and the practice of these men going on in their own way, against the recommendation of the Board of Trade, against the recommendation of Lloyds, against the recommendation of the United States Govern-
[fol. 532] ment, people who are employed by the public to investigate this subject, have produced these fires and will

continue to produce disaster. I am quite within my rights when I call all this to the witness' attention. He states himself as an expert on this subject of spontaneous combustion. He doesn't know anything about it at all, and I am testing his knowledge by referring to authorities and asking him what he——

The Court: I didn't understand him to testify as an expert. He has testified as an expert on the practice and customs of trade. He hasn't attempted to tell me the science, and I sustain the objection.

Mr. Jones: He has testified this place was safe.

The Court: But he knows nothing of the science. He has only testified of experience.

Mr. Jones: Then I move to strike out his testimony about the place being safe. How can he testify about the place being safe when he knows nothing of the question of ventilation and the danger of combustion?

The Court: Just from experience. I deny your motion to strike it out and give you an exception.

Mr. Jones: I offer the pamphlet as an official publication of the United States Government.

Mr. Keating: I object to it. I have no opportunity to cross-examine Mr. Hood, whoever he may be, or Mr. Albert B. Fall.

[fol. 533] The Court: I am not a jury, Mr. Keating; you don't need to emphasize that.

I don't think it is of any use. They don't dispute that fires are caused by oxygen combining with coal, so as to generate heat, and this oxygen is gotten exclusively from the air. I don't see much trouble in finding specific findings that will be agreeable to both of you on that point.

Mr. Jones: The finding I want your Honor to find is that it was unsafe.

Mr. Keating: It doesn't mention the work bunker in the whole pamphlet, and what he says wouldn't have any particular——

Mr. Jones: This witness says there is no difference between the general principle of stowage on land and on shipboard. What could there be? It doesn't matter whether the factors operate aboard the ship or in a house.

The Court: I don't think there is any question but that spontaneous fires are caused by air getting into coal piles.

No question about that. The only question is what is needed in the way of due caution to prevent. Now, sometimes, as one of your witnesses testified, fires occur when nobody can explain what the contributing cause was at all. Other times fires occur by spontaneous combustion when anyone could see what caused it. Now, my job is merely to determine whether the precautions taken in this case were reasonably careful, and I don't think it is necessary at all to go further into the science.

[fol. 534] Mr. Jones: I think, if your Honor please, the science is quite plain, and what the reasonable precautions are are quite plain.

The Court: Of course, if you have evidence on that point I will take it. Does it say anything about closed spaces like bunkers?

Mr. Jones: Your Honor can read the pamphlet. It is quite plain. I would like to have the pamphlet marked for identification.

The Court: Oh, certainly, mark it for identification. Have you ever heard of this pamphlet before?

The Witness: Yes, I have.

The Court: You have read it before?

The Witness: Yes.

The Court: Is it a recognized authority?

The Witness: It is made from tests that have been made, but I couldn't get from it just exactly the percentage of oxygen.

The Court: That is enough, thank you.

The Witness: Eventually that percentage of oxygen, in order to——

The Court: Don't say anything more, please.

(The pamphlet was marked for identification Exhibit 28.)

Q. You know, do you not, that beginning with 1875 there have been various investigations to ascertain the causes of the frequent fires on shipboard in coal?

A. Yes, sir.

Q. And that the whole subject has become one of recog-[fol. 535] nized danger of fire in ship's bunkers in coal?

A. Been largely dealt with, yes, sir.

Q. And you know that this matter of fire on shipboard, in coal, is regarded as a serious danger, don't you?

A. Yes, sir.

Q. And that there have been a large number of such fires?

A. There have.

Q. And you know that Lloyds have made a special investigation and made special recommendations as to what should be done on shipboard with respect to preventing these fires?

A. Yes, sir. Most of your pamphlet deals with coal cargoes, not actual bunkers.

Q. "Coal bunkers and cargoes," this says. I am reading from Exhibit 16: "The Chairman having been requested that the question of the occurrence of fires in coal bunkers should be looked into——"

A. Yes, sir.

The Court: That is Milton's book?

Mr. Jones: I would say that this man is not an expert at all, your Honor. All he has testified to is his own experience. It is a limited experience, and I don't think he is qualified to testify.

Mr. Keating: Mr. Jones assumes that nobody can learn anything except out of books; and, unless written by a college professor, they don't mean anything. Now, I think that a man's practical experience is as good and full as somebody filling some chair in the college library.

The Court: Mr. Jones, this man admits he knows nothing about the science.

By the Court:

Q. Do you know anything about the science?

A. No, sir.

[fol. 536] The Court: His testimony is admitted solely on his observations. It isn't necessary to test him further on the science.

Mr. Jones: I am not testing him on the science, if your Honor please. I am going to ask him certain definite questions. I am going to ask him if he agrees with certain recommendations made by the gentleman.

By Mr. Jones:

Q. Recommendation No. 5 by Mr. Milton is:

"To minimize the absorption of oxygen by the coal in reserve bunkers, or in any bunker in which men are not actu-

ally working, the lower doors should be kept absolutely closed, so as to prevent any current of air whatever passing through the bunker and into the mass of coals."

Do you agree with that recommendation?

A. Your door is usually kept shut, but I don't see where it makes any difference as regards oxygen passing through the coal. The ordinary reserve bunker is usually a side bunker, usually in the way of the engine-room space, forward portion of the engine-room space, and it has practically got no bottom in it because your bilge limbers are open all the way through, so you have air coming up through the wooden ceiling all the way along there.

Q. Do you agree that that recommendation should be followed?

A. It is followed; that is, always followed except when you are using that bunker. Your reservation bunker is used as such.

Q. You can read No. 5 and tell me whether or not that should be followed or should not be followed?

A. That is right.

[fol. 537] Q. You think it should be followed—the recommendation should be followed?

A. The reserve bunker when not working should be closed, but it doesn't prevent oxygen from going through the body of your coal.

Q. Well, then, we will go on: Recommendation No. 9: "Where bunkers are over gutterways, and so forth, special care should be taken that the limbers are tight. Several fires have originated in bunkers just over the limbers, and there is reason to suppose that they have been caused by air circulating through the coal and coming from the limbers." Do you agree with that statement?

A. That is approximately correct.

Q. And you think that the gutterways should be made tight?

A. I have never known them to be made tight.

Q. But you think they should be tight, to get a safe place to store coal?

A. It is a safe place to store.

Q. But you think it should be made tight in order to obtain a safe place to store coal, don't you?

A. According to the extremes carried out. According to my experience on a ship, no.

Q. Mr. Milton also recommends that "If any coal is left in the bunker when a fresh charge has to be taken in, it should be trimmed into a position to insure its being used on the next voyage. It cannot be too strongly impressed upon those responsible that danger of over-heating and spontaneous combustion increases with the length of time the coal remains in the ship." Do you agree with that statement?

A. If it is high enough and everything is agreeable to it, it should be pulled down; but if in good shape, it isn't necessary.

[fol. 538] Mr. Jones: If your Honor please, I make a formal offer of this document. I offer in evidence this printed publication, issued by the Government Printing Office at Washington, and which is a paper produced from the files of the Department of the Interior, an executive department of the United States, entitled "Technical paper 311. Department of the Interior, Bureau of Mines. Factors in the Spontaneous Combustion of Coal," by O. H. Hood, and bearing the printed seal of the Department of the Interior. This publication, at page 1, specifically refers to spontaneous combustion on shipboard.

Mr. Keating: I object to that on the ground that it is incompetent, irrelevant and immaterial, what someone in the Department——

The Court: I will sustain the objection and give you an exception.

Mr. Jones: I ask that it be marked in evidence.

(Marked Exhibit 28 in evidence.)

Mr. Jones: You don't dispute that it came from the files of the Department of the Interior?

Mr. Keating: I don't think so, if it is the same as our own.

(Witness excused.)

[fol. 539] Fletcher Holman Starr, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Starr, will you state to the Court your education and experience?

A. I graduated from the United States Naval Academy, taking while there the standard courses, which include not only the deck work of navigation and gunnery, but also engineering. I graduated as a past midshipman, went through the various grades, ensign, junior and senior lieutenants, Lieutenant Commander and Commander. I resigned my commission after the war as a Commander. My total naval experience is 16 years.

My experience after leaving the Naval Academy included both engineering and what we call line duty. Line duty may be either gunnery or navigation, technical radio, or any of the other duties on board ship. At the time there was no specialization in engineering. Every line officer took an engineering examination at each promotion. So, in addition to the engineering duty to which I was assigned in the normal course of my duty, I had to keep abreast of engineering and in constant touch with engineering. My engineering duties included assistant engineer on three battleships, chief assistant engineer on another, chief engineer on a gunboat, and chief engineer on a battleship, and also had special work in engineering at the Government Testing Plant in Philadelphia.

Q. What kind of testing?

A. Fuel oil; that is, after the ships began to change to oil.

[fol. 540] When I left the service as a Commander I was qualified to be a chief engineer on a battleship, one of coal or oil, and to take command of a cruiser, cargo ship, collier, or any one of the smaller naval vessels.

Q. Since you resigned from the Navy what have you been doing?

A. When I left the Navy I took up the profession of consulting engineer on combustion, which I have carried over for the last seven or eight years. That has included the burning of fuel gas, oil, powdered coal, and quite a little to do with coal efficiency tests under boilers. It has thrown me in touch with power plants on shore.

Q. Where is your office?

A. In the Atlantic Building, in Philadelphia.

Q. Will you state what your experience was with coal at sea?

A. I had to do everything that could possibly be done with coal at sea. In our practice cruise as midshipman we actually acted as coal passers in the coal bunkers, putting coal from the place aft of the bunker doors out to the boilers, firing the boilers, operating derricks in the colliers, inspecting bunkers; everything that has to do with coal I went through in one form or another at various times.

Q. Will you describe the method of bunkering naval vessels?

A. In naval vessels the procedure is: That when you are going to take coal—when you are informed you are going to take coal—the chief engineer and generally an assistant goes through the various bunkers to make an accurate estimate of the amount of coal on board. That must be very carefully calculated because the ships are rated on an efficiency basis, and each pound of coal is very precious. So an inspection is made by going into the bunkers, and [fol. 541] as many of the bunkers are worked in ships, it is very hard to make an accurate estimate and very involved. The old coal in the bunkers, especially the reserve bunkers, is leveled practically level before the new coal is put in. Now, in the service bunkers down in the fire room, at the fire floor level, any sweepings or old coal is generally shoveled toward the door to allow room for the new coal to come in.

Q. Do you ever throw old coal away?

A. No.

Q. What is the practice of the storage of new coal on top of old?

A. In the United States Navy I don't think there has ever been a naval ship bunker where new coal hasn't been put on top of old coal.

Q. Is that the usual practice?

A. Yes, sir.

Q. And what is the practice of using up the old coal first?

A. The regulations have always called for the use of the old coal first, if practical. The only place it is practical are in the service bunkers, which open right into the fire room.

It would be very difficult and almost impossible to get all the coal out of the reserve bunkers, and the shorter part through the wing bunkers and down into the service bunkers, that open into the fire room. It would be so impracticable that it is never attempted.

Q. Do you consider that the practice of storing new coal on top of old coal is a bad practice?

A. Not in any way, provided the old coal is properly inspected.

Q. What do you mean by "properly inspected"?

A. Inspected for a condition which makes itself known primarily by temperature. If there had been an over-heating it would be determined possibly by giving off a gas [fol. 542] that could be smelled or the actual temperature of the coal. We used to simply dig our hands down into the coal to see whether it was hot or not.

Q. If it was hot——

A. If it wasn't hot we would trim the new coal over the old coal. If there was any sign of it being hot we would, before we put any new coal in there, take out all the coal we thought might be at a hot spot and throw it out on to the fire room floor or spare bunker or on the deck to cool off. It would cool off in a few hours. Coals having been cooled, there is no danger in restoring the coal.

Q. Mr. Starr, what have you to say about bunker surface ventilation?

A. Theoretically there should be only surface ventilation in a bunker, and surface ventilation means the most adequate ventilation you can supply upon the coal. On a fore and aft bunker you have two ventilators, one in the forward end and one in the aft. These ventilators would open above the coal. The coal would never be loaded above the end of the deck beams, supporting the deck above, so there would be air space for ventilation. In additions, on some of the bunkers, where practical, we would even cut in through the bulkhead at the top, over the coal, to permit air going in and sweeping across the coal. On the thwartship bunker it was obviously impracticable to have ventilators fore and aft, abreast, on the other side, the other end of the thwartship bunkers, the practical plan being to have your two ventilators as far apart as you could in the space.

Q. There is no magic about putting them at one end and the other end, is there?

A. The theory is that it is entirely to relieve it from gases [fol. 543] which might be explosive when mixed with the proper proportion of air, and you best relieve the bunker of these gases by having the two ventilators cover the largest area, so they are safest further apart than close together. Other than surface ventilation, there should be theoretically no other ventilation in the bunker.

Q. Have you ever found that condition?

A. I have only seen that condition in one bunker. We had a reserve bunker on a ship of the Nebraska class, which is quite an old battleship. It had storage for about 100 tons of coal, and had no ventilation. It had a bunker plate on deck. That coal was placed there to be used as a last resort, in case we had used everything else. The way we handled that bunker was to take off the bunker plate once a week for about an hour. That was the surface ventilation of that bunker. That is the only bunker that I would have called absolutely airtight.

Q. Has surface ventilation anything to do with spontaneous combustion?

A. From my experience and everything I have been able to read and study, surface ventilation not only has nothing to do with spontaneous combustion, either in its generation or consummation, but is actually useful in stopping spontaneous combustion; and the Navy regulations recommend that where coal is showing signs of heating, not only the ventilators are put wide open, but the hatches are taken off to provide extra cooling for the coal.

Q. In your experience have you ever seen wooden bulkheads used in the carriage of coal?

A. Oh, a great many.

Q. What have you to say about that?

A. A wooden bulkhead on board ship is simply used to [fol. 544] give flexibility to a particular space, whether it is cargo or coal. I don't think anyone would prefer a wooden bulkhead to a steel bulkhead, but on a Navy collier or any other kind of auxiliary ship, if you had a space or bunkers, one time you might want to carry stores of various sizes and at other times stores of various other sizes. The wooden bulkhead is the only answer to give the flexible space for storage, and wooden bulkheads have always been used

for that purpose. As far as I know, they still are. I haven't had any experience in the last couple of years.

Q. Now, you heard me describe the wooden bulkhead on the "Galileo" in No. 3 tween decks in my hypothetical question. You were present both times when I read it?

A. Yes.

Q. What is your opinion with respect to that bulkhead as described?

A. I believe that is a very substantial construction, strong, and a perfectly suitable bulkhead for the purpose.

Q. Have you seen other similar bulkheads?

A. Yes.

Q. What is the purpose of those wooden bulkheads at sea?

A. Just as I have said, to give flexibility to the cargo space or the storage space. I am explaining that with a little effort a wooden bulkhead can be knocked down in two or three hours and set up 10 feet further forward, and being equally strong, and a steel bulkhead can be moved only at a shipyard.

Q. Are steel bulkheads, other than water-tight bulkheads, air-tight?

A. No, a water-tight bulkhead automatically means air-tightness and means more than that. It means strength to resist water pressure if the compartment is punctured. It doesn't really mean air-tight. It means a safety bulkhead [fol. 545] against the inrush of water in case something hapened to your ship.

Q. Any other bulkhead other than a water-tight bulkhead, air-tight?

A. No, there is no attempt made to make it air-tight unless there is some special reason.

Q. What would you say was a safe bunker on a cargo vessel such as the one on the "Galileo"?

A. Theoretically there is no such thing as a safe bunker. Bituminous coal is uncertain and dangerous. Practically any bunker is safe that is away from a source of heat, and inspected properly, and with sufficient frequency. With surface ventilation, that question of safety is entirely a matter of the efficiency of your sea-going personnel. There is no such thing as a safe powder magazine. We carry thousands of pounds of gun cotton, and if that gun cotton

isn't inspected the magazine isn't safe. If coal isn't inspected, I don't care what the storage is aboard ship, it isn't a safe bunker.

Q. You mean the safety of a bunker depends upon the inspection?

A. Yes, depends on the proper inspection. I might add something to that: The theory is, hot coal or warm coal is very much more apt to generate spontaneous combustion than cool coal. Well, as everyone knows, when you get to sea, especially down in the Tropics, you have certain bunkers which you must keep below 90 degrees, say even 120 degrees, and when you are in a situation where you have got to go through the Tropics and have got to use certain bunker space assigned to you, you are simply more alert in your inspection and careful to see it is in good condition, and a little more quick to move it if it shows signs of over-heating.

[fol. 546] Q. Now, just what causes the spontaneous combustion of coal, Mr. Starr?

A. Before I answer that I would like to say I am not an expert chemical engineer. I have taken chemistry and used a certain amount of chemistry as an engineer, but I have not run such extended tests as Professor Parr has described, but I have read most of the available stuff on it and think that qualifies me. I will not answer the question if Mr. Jones objects.

Mr. Jones: I don't object.

A. (Continuing:) Spontaneous combustion of coal is the chemical action caused by the absorption of oxygen by the coal itself.

Q. Is the absorption greater at the higher temperature?

A. As the temperature increases the absorption is much more rapid.

Q. Is it usually a slow or quick process?

A. It is very hard to answer that. Normally, starting on normal coal under normal temperatures, it is a slow process.

By the Court:

Q. What methods have they for ascertaining the temperature of coal in a pile?

A. The only way you can get the real temperature is to put down a portion of pipe in each pile and then lower a thermometer down inside the pipe.

Q. Is that done in the Navy?

A. In the Navy today the bunkers are fitted with thermometers, alongside of which are placed the record and ordinary temperature. I don't think this is carried out in the Merchants Service, and the Navy is always willing to [fol. 547] spend more money. Sometimes in a new bunker there has been a hot spot which has taken—I know of one case—it takes about two weeks to find it. We smelled the gas from this one hot spot.

Q. You can smell gas when coal is getting hot?

A. I have never heated coal to get the gas, but I have smelled gas from hot coal several times, and it was my impression, until Mr. Porter testified, that all coals give off gases you can smell. All hot coals I have been in touch with give off gases which you can smell.

Q. What is the ordinary way in the Navy of determining whether coal was hot or not, in the absence of those thermometers?

A. We simply crawled over it after it had been leveled off; dig our hands in. Of course it is very closely confined, and you can always get a faint odor of gas or feel the actual temperature.

By Mr. Keating:

Q. Mr. Starr, you heard me read the hypothetical question?

A. With reference to the bunker space?

Q. With reference to the bunker space before it had any coal in it at all.

A. Yes, sir.

Q. Would you or wouldn't you have considered that a dangerous place in which to store coal in June, 1926, assuming there was no coal in it at that time?

A. I wouldn't have assumed it a dangerous place to store coal.

Q. Would you have stored the coal?

A. If I had been the commanding officer or the chief engineer of the vessel.

Q. Assuming the coal was in that space from June 30th to August 26th, and that there remained of the original coal [fol. 548] 160 tons and it was proposed to carry 200 tons of additional coal, what would you have done with respect to the 160 tons of coal remaining from the June voyage, in August, 1926?

A. Well, based entirely on my naval experience, I would have leveled that coal off and taken the new coal on top of it, and the reason why I would have leveled off would be to get an accurate estimate of the amount of coal in there.

Q. Would you have made an inspection of the coal before you put the new coal in?

A. Absolutely; gone over every foot of it.

Q. And after the inspection you made, would you have considered it safe, assuming that your inspection didn't show that the old coal was hot, would you have considered it safe and a proper thing to load that additional 200 tons in that space?

A. Certainly.

Q. If the coal remaining in the bunker space No. 3 between decks wasn't heating and was cool on August 26th, 1926, would that have been any indication as to the safety or the dangers of the space in which it was carried?

A. If you assume that coal was loaded in there in the latter part of June and stayed cool until August 26th, from my experience it would be a very normal assumption that that would be a very good place to store coal.

Q. Are you familiar with Lloyds instructions?

A. I have read Lloyds instructions.

Q. Do you know the purpose of those instructions?

Mr. Jones: I object.

The Court: Overruled, with an exception.

A. The purpose of Lloyds instructions——

[fol. 549] Q. Do you know what the purpose is?

A. The purpose of Lloyds——

Mr. Jones: I object to it. Yes or no is the answer.

Q. In this one particular please obey Mr. Jones. Do you know or do you not?

A. I think I do.

Mr. Jones: I object to that, your Honor. The witness says he thinks he knows.

The Witness: I never talked with the man who wrote the instructions.

The Court: But do you know how they are used generally?

The Witness: Yes.

The Court: I will allow it and give you an exception.

A. The purpose of Lloyds instructions is a guide to mariners, both navigating and engineering, to try to improve sea-going practice, and they give, as far as I know from my sea-going experience, the theoretically perfect goal which you try to attain in handling your ship and running your engines—setting your goal in everything else pertaining to going to sea.

Q. They aim at perfection?

A. They give you the best knowledge available at the moment, toward which end you should strive in handling your ship.

Q. Are you familiar with Morrisdale coal, Mr. Starr?

A. Perfectly.

Q. Would the fact that Morrisdale coal was used in the bunkers on the "Galileo" affect any of the answers in your previous testimony?

A. Not at all.

[fol. 550] Q. Is Morrisdale coal bunker coal?

A. Yes.

Q. Have you had any personal experience with spontaneous combustion on ships?

A. I have never had experience with a coal fire.

Q. What about hot spots?

A. I have had experience with several hot spots.

Q. How did you find them?

A. Generally by smelling, occasionally by temperature. In each case during a bunker inspection.

Q. First of all, if the coal is hot and you smell gas it ought to be taken out. No question about that?

A. Absolutely none.

Q. And an inspection would determine the condition of the coal, would it not?

A. Yes.

Q. Any magic about making an inspection?

A. None that I know of.

Q. Is that within the knowledge of the ordinary chief engineer?

A. I don't see how a man could get his chief's license without knowing so.

Q. Are you familiar with the Bureau of Mines publication on the subject of spontaneous combustion?

A. I have read it.

Q. Do you know the purpose of this publication?

Mr. Jones: I object.

A. I do.

Mr. Jones: The publication speaks for itself. It is hearsay.

The Court: Lloyds isn't used in a particular trade. Have you read that?

The Witness: Yes.

The Court: Is there anything in there with which you disagree?

[fol. 551] The Witness: Not theoretically, no.

The Court: I would like to have this in evidence.

Mr. Keating: I will agree to it.

(Marked for identification Exhibit 28.)

Q. You said to his Honor in answer to his question which he asked you with respect to Exhibit 28, that there was nothing with which you disagreed in theory in this pamphlet. Will you explain to his Honor what you meant by your answer?

A. I meant by that answer that that pamphlet is clearly the latest and best thought on the causes of spontaneous combustion and the prevention, elimination of gas, and gives you an ideal to which you are trying to approach in your coal storage whether ashore—this is chiefly ashore, but it would apply afloat in theory.

The Court: We will take a recess until 2:15.

Recess until 2:15 P. M.

Met pursuant to adjournment at 2:15 P. M.
Present: As before.

FLETCHER HOLMAN STARR resumed the stand.

Direct examination.

By Mr. Keating (continued):

Q. Mr. Starr, will you assume that in No. 3 'tween deck space on the "Galileo", as described to you in the hypothetical questions, a hot spot to be developed in the coal [fol. 552] which lay in a slanting pile against the starboard side of the vessel, abreast of the hatch, the hatch being about 17 feet from the forward wooden bulkhead; will you state whether any air passage through the wooden bulkhead could have had any effect on this hot spot either in generating it or increasing it after it had started?

A. Any air leaking through the wooden bulkhead under no set of circumstances that I can possibly conceive could have ever started a hot spot or added anything to such hot spot which formed abreast of the hatch or even with the hatch on the starboard side of the ship.

Q. Why not?

A. The very nature of the coal itself is such that it will pack so that air under no real pressure would in any case seek the easiest path to the atmosphere. Even with air from a blower at high velocity would not get back through there, through 15 feet of packed coal.

Q. I think, Mr. Starr, it was testified by Mr. Margarelli at least that the hot spot that he put his hand on, or the vicinity of the hot spot, was on the starboard side of the vessel about abreast of the hatch, I think that is what he said. If there was heating in that portion of the coal that I have described to you, the pile slanting up backward toward the forward end of the compartment, where would the air come from, in your opinion, which would reach that particular spot?

A. It would be much more apt to come from the 'tween deck itself. The air against the face of that slanting pile would be more apt to cause a hot spot than any other air you could get into the pile.

Q. Does the point of the fire as described by Mr. Margarelli enable you to form any opinion as to the air coming through the bulkhead?

[fol. 553] A. Well, only the opinion that whatever air came through would have nothing to do with the fire which started from a hot spot abreast of the hatch.

Q. That spot was too far away from the bulkhead?

A. Definitely, yes.

Q. Mr. Starr, in considering the subject of theoretical perfection, what would you say to the use of anthracite coal on cargo vessels in bunkers?

A. Anthracite coal would be a very fool-proof, safe fuel to use.

Q. What about its suitability for steaming the vessel?

A. Anthracite coal is used only on yachts, but due to its expense primarily it is never used in any other service that I have ever heard of.

Q. What about its firing qualities?

A. You can't expect, without the special equipment, to get the capacity out of the boiler with anthracite that you can with bituminous.

Q. Would you recommend the using of anthracite coal for cargo vessels?

A. Certainly not.

Q. Mr. Starr, I show you Exhibit No. 27, which was Mr. Laverie's sketch of a coal bunker, this space "A" being the lower hold, "B" tween decks, and "C" the shelter deck. These lines marked "X-Y," "T-S," and "M-N" are described as beams. Now I want to know whether in an ordinary bunker on a ship there is a bunker that goes all the way down?

A. Ordinarily there are hatches or chutes cut through what I call a through bunker, that is, a bunker where these compartments are vertical. There would be a communicating hatch or chute through the center at some point of the deck, which these beams support. In filling this bunker you have to keep these hatches open because after the coal is exhausted the only way you can get to B hatch would [fol. 554] be to get on to B deck, above the coal, and open that hatch, on deck supported with beam marked X-Y, and similarly use the coal in C. You would have to give a clear passage to the hatch that was to let the coal drop from B into A.

Q. If there is any air gotten into that bunker at the line X-Y or the line T-S, would that get into the coal?

A. Absolutely.

Q. Any question about that?

A. None whatever.

Q. Is there any way of keeping that air out if those beams aren't tight?

A. Those beams aren't tight. There is no way to keep the air out. There is no way of keeping the air out if the service door is kept open (indicating the bunker marked A), the bunker at the fire floor level.

The Court: It is the practice to take the coal out of the lower bunker first?

The Witness: You have to unless you drop it down to this service door and then it is handled out on the fire floor.

Q. Mr. Starr, when you put coal into a bunker is there any air in there before you put the coal in?

A. Naturally.

Q. Do you know of any coal bunker that is built where the air is all pumped out before they put the coal in?

A. No.

Cross-examination.

By Mr. Jones:

Q. Mr. Starr, from one of the answers which you gave in the earlier part of your testimony, I take it that you refer to some rule or regulation in the Navy with respect to not putting coal in the same compartment where there [fol. 555] was a magazine for the stowage of powder?

A. No, sir, I certainly didn't mean to say that, and I think you must have misunderstood. I compared a safe coal bunker to a safe magazine.

Q. You have testified to piling coal up around a magazine which you have constructed for the stowage of powder?

A. Both powder and bituminous coal are necessarily dangerous. There would be no reason for putting the two things next to each other.

Q. They should be separated?

A. Absolutely.

Q. Now, Mr. Keating asked you some questions with respect to the location of a hot spot. I show you a drawing which is a part of Exhibit No. 14, showing the area around which the deck was distorted on the "Galileo"

after the vessel was examined, after she was raised. Would you say that indicated fire originating in the vicinity of the wooden bulkhead?

A. If I am—I am asked to accept this plan as accurately representing the damage?

Q. Yes.

A. This plan represents that the hottest fire was in the part indicated by the dotted line.

Q. And it indicates the fire did originate in that area somewhere?

A. Not necessarily.

Q. There is no indication of fire outside that area?

A. Drawn on this plan?

Q. Yes.

A. No, not on this plan. I didn't inspect the ship.

Q. With that plan before you, taking that as an assumption of facts, that indicates that the fire did originate in the vicinity of the wooden bulkhead?

A. If there is no other effect of fire in this space, it clearly indicates that the fire was localized here and this [fol. 556] is where it originated and was hottest.

Q. Now, I understand you to say, and if I am wrong, please correct me, because I don't want to get facts on the record that are contrary to what you wish to testify to, but I understand you to say that you agreed with something that was said by Professor Parr, that when coal reached a temperature around or above 90 degrees, that you considered that a dangerous point?

A. I said that close up to 120 degrees—some authorities only say to 90, but the service regulations say that when coal reaches 120 degrees, then it becomes dangerous and that it must be watched closely.

Q. That is what I had in mind.

A. Yes.

Q. You don't mean to suggest that you can tell when coal reaches 120 degrees by putting your hands on it?

A. I don't mean to suggest that I can record temperature through my fingers.

Q. I don't think any other man would want to suggest that. Now, would you consider it safe or prudent to put a new stock of coal on top of old coal?

A. I have to qualify that answer. If I were permitted to inspect carefully the old coal I would think it perfectly safe to put new coal on top of it.

Q. By careful inspection I assume you mean by driving pipes down into the coal to get the temperature all the way through the mass of coal?

A. Depending upon the depth of the coal, your inspection would depend. In this particular case, assuming a depth of 7 feet, in a slanting pile, I would have personally satisfied myself if I could have run my fingers into it and smelled along the face of the coal. I would have considered I had given it a practical inspection for conditions.

[fol. 557] Q. Will such an inspection indicate the presence of a hot spot 7 feet down in the pile?

A. My definition of a hot spot would certainly be indicated by such an inspection. A hot spot may mean one thing to me and another thing to somebody else.

Q. Now, your testimony came as somewhat of a surprise to me in one particular, that is, what you said with respect to placing new coal over old coal. The reason why it came as a surprise was because that is a subject that has been in litigation before and seems to be pretty well established in the law books that this is a most negligent and dangerous thing to do.

Mr. Keating: No, your Honor, I object to that statement by Mr. Jones. I dispute it also.

The Court: Strike it out.

Mr. Jones: As I understand it, your Honor, in cross-examination I am permitted to show the witness such facts as I see them.

The Court: I am not going into collateral issues at this point. It is stricken out, and I will give you an exception.

Q. Do you know, Mr. Starr, that it is generally considered a dangerous practice to put new coal on top of the old coal?

A. My knowledge is that it is very usual practice to do it. That has never been demonstrated to be dangerous in my experience at sea; that there are no records, at least, in the Navy, to prove it dangerous, and therefore I can't see why it is dangerous.

[fol. 558] Mr. Jones: I move to strike out the answer as not responsive. I asked the witness——

The Court: I will let the answer stand, with an exception.

Q. Don't you know, Mr. Starr, that it is generally considered a dangerous practice to put new coal on top of old coal?

A. My answer is no.

Q. Have you known of any cases of spontaneous combustion in the Navy?

A. A great many cases.

By the Court:

Q. Is there any regulation at all in regard to putting new coal on top of old coal?

A. The regulations say that the old coal shall be arranged in the bunkers to be used first. Like other regulations, it is not always possible to do that. It might take days to move the coal around so that every bit of old coal would be used before the new.

Q. Is there a regulation in regard to putting new coal on top of old?

A. Not specifically. Regulations simply say that old coal shall be used first.

By Mr. Jones:

Q. If the new coal is put on top of the old coal obviously the old coal cannot be used first?

A. Obviously the first coal will be used first.

Q. If you put the new on top of the old?

A. Yes.

Q. Don't you have to remove the new before the——

A. The old comes out before the first.

[fol. 559] Q. What I am putting to you is this: Where you have a hold, which is on an incline, running toward a hatchway, and the coal is piled against a bulkhead, and other coal is put in in front of that coal over a hatchway which runs to a lower deck, isn't it obvious in the arrangement that the new coal must be used first to get at the old coal?

A. Yes, it is obvious that the new coal would be, if used through the hatchway.

Q. Or used through the passageway leading into the compartment?

A. Yes.

Q. You are familiar with the way this compartment was constructed?

A. With the only exception that the doors in the after bunker, which would permit access to the old coal first or part of the old coal——

Q. I show you Exhibit 11, showing you how the compartment was constructed, the passageway on the starboard side, and the passageway on the port side. Coal was piled against the wooden bulkhead shown in the sketch and I imagine extended on the starboard side and the port side, and new coal was put around the center on the old coal. Isn't it obvious that if coal is moved through the passageway it would have to be new coal which would be removed before you could use the old coal?

A. With the exception of the amount of old coal against the door, which would have to be used, yes.

Q. With respect to the coal that was slipping up toward the compartment?

A. That would have to be used last.

Q. And the coal so stored wouldn't be in accordance with Navy regulations?

A. Coal so stored wouldn't meet the regulations with reference to the placing of old coal in such a position that it would be used first.

[fol. 560] Q. Quite so. I am certain we understand your testimony unless you—do you mean to say that through ventilation of a pile of coal isn't dangerous?

A. What do you mean by through ventilation?

Q. By permitting air to pass through the body of the coal?

A. How much air?

Q. The amount of air that could enter a bulkhead, and through the cracks of a wooden bulkhead.

A. How much would that be?

Q. (Continued.) And permit the oxidation of a patch of a pile of coal?

A. The reason I go into detail and want to know is: Through ventilation is one of the safest ventilations if you have enough of it.

Q. That is, if it is extensive? In other words, what I mean to say is this: If you have a bulkhead which rests

in a slot, in which the beams rest on the deck, permitting air to pass underneath, also permitting a certain amount of air to pass through the cracks of the bulkhead, do you mean to suggest that such an admission of air to the mass of the coal isn't dangerous?

A. I don't think anybody can say, Mr. Jones.

By the Court:

Q. Do you know how this bulkhead was made?

A. Yes, but I don't know how big the cracks were.

Q. Assume that they were put close together; there would be some air?

A. I couldn't honestly conceive of air getting through a so-called dustproof bulkhead, made the way that one was made, in sufficient quantity to even approach causing the fire that happened on the "Galileo," and I have been studying [fol. 561] this thing for a year and a half.

By Mr. Jones:

Q. Now, Mr. Starr, I call your attention to a book called "Steam Boiler Engineering", published by the Heine Safety Boiler Company, and I ask you whether this is recognized as a standard book in the enginering world?

A. Yes, sir.

Q. I call your attention to page 467 of that book and I will read a paragraph and ask you whether you agree with it: "Spontaneous combustion of coal is due to slow oxidation in an air supply sufficient to support the oxidation, but insufficient to carry away all the heat formed. The friability of the coal, or its tendency to break up into fine particles and dust, as well as its chemical nature, are the major causes of spontaneous combustion." Do you agree with that statement?

A. I agree, except with the friability of coal being the cause of spontaneous combustion.

Q. But you agree that sufficient air to support oxidation but insufficient to carry away all the heat formed is a major cause?

A. Yes, beyond any question.

Q. Spontaneous combustion is due to the slow oxidation in the air supply, sufficient to support the oxidation, but insufficient to carry away all the heat formed?

A. Yes, sir.

Q. That you consider the major cause of spontaneous combustion in coal?

A. Yes, sir.

Q. Then, as I take it, what you recommend is either a sufficient ventilation to keep the coal cool under all circumstances or no air supply at all to the body of the coal?

[fol. 562] A. That is theoretically correct. That would be a theoretically perfect condition.

Q. Mr. Starr, it is entirely feasible to build an airtight wooden bulkhead so that bulkhead would be quite airtight, say from 3 feet from the deck to the deck below, isn't it?

A. You mean aboard ship?

Q. Aboard ship?

A. I have never seen——

Q. I didn't say what you have seen. I mean it is feasible?

A. No, it is not.

Q. You could have your wooden beams on which your bulkhead depends for its support attached to the deck plating so you could get a perfect fit?

A. Until the ship works.

Q. And one of the witnesses referred to putting, I think, white lead on to make a tight joint; that could be done?

A. Yes, sir.

Q. And you would have a tight joint?

A. When you build it.

Q. And you could put paper over it, I think one of the witnesses referred to putting heavy tar paper?

A. Yes, sir.

Q. That could be done?

A. That would help to make it tight.

Q. So you could make a tight bulkhead by the expenditure of comparatively little money, couldn't you?

A. (No answer.)

Q. That is true, isn't it?

A. That depends on what you mean by tightness. You couldn't make a wooden bulkhead tight.

Q. You could make it——

A. Dust-proof.

Q. But practically tight if you had done what I said, couldn't you?

A. At the time you did it it would be practically air-tight.

[fol. 563] Q. Now, the expense of doing that isn't very great?

A. What you suggest—paper?

Q. Yes.

A. That isn't very great.

Q. Now referring to those cowl ventilators which you mentioned: Isn't it a fact that unless you have one ventilator in the forward part of the compartment and another in the after part of the compartment, that you get practically no circulation in the compartment throughout the whole compartment?

A. No, sir.

Q. On the surface, I mean.

A. No, sir.

Q. Assume you have both your ventilators in the after part of the compartment, is it your suggestion that you will have circulation of air in the forward part of that compartment?

A. How wide is the compartment?

Q. 50 feet width.

A. I mean, how long?

Q. 33 feet.

A. And I——

Q. The ventilators being placed 23 feet and 8 or 10 inches abaft the forward wooden bulkhead and I should say about 8 feet forward of the after wooden bulkhead?

The Court: It would be 10 feet, wouldn't it?

Mr. Jones: It would be 10 feet, that is right.

A. Between 9 and 10 feet? Am I asked whether the ventilators in the position you give me—whether or not surface ventilation would be perfect?

Q. Yes.

A. It would not be perfect.

Q. Would be as good as if you had a ventilator in the forward part as well as in the after part of the compartment?

A. Would that location of ventilators be as good as the [fol. 564] ventilators forward and aft in line, amidships?

Q. Yes.

A. The thwartship ventilation would be better.

Q. Now, the Board of Trade has recommended that ventilators be placed in the opposite ends of the compartments.

A. Yes, sir.

Q. And that is a regulation, and by that you understand fore and aft.

A. Yes.

Q. So you disagree with the Board of Trade?

A. I don't understand that they mean fore and aft in a thwartship compartment that is comparatively narrow.

Q. Isn't it true that ventilators on board ships are built so that the movement of the ship through the water supplies the current of air that is admitted to the compartment by ventilators?

A. Yes; it is equally true that with a direct wind you get a movement from port to port and starboard to starboard, and may be a month at sea and never get a movement.

Q. Isn't it true that the movement of air is in the opposite direction in which the mouth——

A. It depends on the way you trim your ventilators and how your ventilators are ranked.

Q. Isn't it obvious that the reason the ventilators are put in the forward and aft ends of compartments is that the movement of the ship itself furnishes the draft to trim the ventilators?

A. I think that fore and aft ventilators in any one compartment on board ships I am familiar with is due more to the shape of the compartment itself than to the movement of the vessel, the idea being to cover as large an area of that compartment with a limited number of ventilators.

Q. Did you ever see a wooden bulkhead on any man of [fol. 565] war of the United States Navy in the bunker space?

A. If you mean by man of war any naval vessel; yes.

Q. What naval vessel? I mean what commissioned man of war did you ever see that in?

A. Supply ships, colliers and, during the war, transports.

Q. They are not commissioned ships, are they?

A. Certainly; commanded by line officers.

Q. But you never saw any ship of the line, any fighting ship?

A. No, sir.

Redirect examination.

By Mr. Keating:

Q. Mr. Starr, you were asked to look at Exhibit 14, and especially the diagram at the fag end, around which there are certain dotted lines. Mr. Starr, suppose the cargo plan of the ship shows that in No. 2 'tween deck forward of that wooden bulkhead was stowed a considerable quantity of lard, has the area of fire—has the heat got anything to do with the area of the fire where the greatest evidences of fire are?

A. If the intensity — the actual flame temperature is shown right there.

Q. Would the fact that lard was stowed on the cargo side of No. 2 'tween deck account for such area as shown on this exhibit?

A. I think it would have quite a lot to do with the hottest point of that fire.

Q. Which burns with greater heat: coal or lard?

A. It depends entirely how you supply air for combustion, but, normally, a lard fire would be hotter than the surface of a coal bed which wasn't getting much air through the bed.

(Witness excused.)

[fol. 566] WILLIAM P. BRAKENBURY, called as a witness on behalf of the respondent, having been duly sworn, testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Brakenbury, what is your business?

A. Engineer.

Q. By whom are you employed?

A. Ellerman's Wilson Line, Limited, Hull.

Q. Where is your headquarters?

A. Hull.

Q. Will you state, Mr. Brakenbury, what your experience has been which has led up to your present position?

A. Well, I commenced as a boy. I went as an apprentice to an engineering shop, after which I went to sea for about four to five years. During that time I had certificates and, after leaving the sea, just shortly after I left the ship, I went into a drawing office. And shortly afterwards I sat for the examination of the British Board of Trade, extra engineer's certificate.

Q. How long have you held a chief engineer's certificate?

A. About thirty odd years.

Q. Did you ever go to sea with that certificate?

A. Yes.

Q. How many years did you serve at sea as chief engineer?

A. I never served at sea as a chief engineer.

Q. How many years did you go to sea as an engineer?

A. About four to five.

Q. How long have you held your present position?

A. As general superintendent?

Q. Yes.

A. About five years.

Q. Mr. Brakenbury, I show you Exhibit 18. Will you look at this exhibit and indicate to me in the vicinity of [fol. 567] No. 3 'tween deck and No. 2 'tween deck where there is a water-tight bulkhead?

A. Water-tight bulkhead here.

Q. Now, we will mark that water-tight bulkhead XY, indicating the water-tight bulkhead in the 'tween deck; is that correct?

A. XY, yes.

Q. And the bulkhead goes all the way down through X to the tank top, which we will mark Z. Now, am I right, Mr. Brakenbury, that the line X-Z represents a water-tight bulkhead on the "Galileo"?

A. Yes, sir; that is right.

Q. Will you mark the next water-tight bulkhead forward of that point? Just indicate it to me.

A. (Witness indicates.)

Q. We will mark that R-S.

A. The first water-tight bulkhead is at Frame No. 100, the next at Frame 147.

Q. Do I understand you to say that the bulkhead at Frame 147, indicated by the line R-S, runs through the beam of the ship up through the 'tween deck?

A. Up to that deck, up to the point R.

Q. What is the distance between those two water-tight bulkheads in the 'tween decks?

A. 105 feet and 9 inches.

Q. That approximately?

A. 47 transverse members.

Q. What is the distance between the frames?

A. 2 feet 3.

Q. Approximately 105 feet 9 inches?

A. Right. There is only about 84 feet here. Something wrong with it. 47 frame transverse members between 100 and 147.

The Court: Something happened to the scale?

Mr. Keating: It is almost impossible to take those photo-
[fol. 568] graphs without distorting the plan.

Mr. Jones: You figure that to be 105 feet 9 inches?

The Witness: Yes.

The Court: The scale isn't exactly right?

Mr. Jones: Mr. Brakenbury wants to check up.

The Court: 47 frames?

Mr. Keating: Suppose you measure it out.

The Witness: 104, 105 feet.

Mr. Keating: I ask that the original of this plan be marked in evidence.

(Same was received in evidence and marked Respondent's Exhibit 18-B.)

(Third copy of plan offered in evidence, received and marked Respondent's Exhibit 18-C.)

By Mr. Keating:

Q. Mr. Brackenbury, looking at Exhibit 18-B, starting at the part you have marked——

Mr. Jones: Did he satisfy himself as to the measurements?

Mr. Keating: Yes.

Q. (Continued.) —on here X-Y, which I understood according to your testimony was the water-tight bulkhead in the 'tween decks.

A. That is right.

Q. What other obstruction was there in that space, start-
[fol. 569] ing at X-Y?

A. There is a steel bulkhead at frame 106.
Q. Is that permanent?
A. That is a permanent bulkhead.
Q. Is it a water-tight bulkhead?
A. No.
Q. Is there any other permanent structure in the space up to the point of the bulkhead marked R-S?
A. No.
Q. In other words, that space that you have indicated is an open space from water-tight bulkhead to water-tight bulkhead, except for the steel bulkhead in the way of the hatch?
A. Yes.
Q. Now, that particular compartment had a wooden bulkhead about in the position which has been marked on this drawing C-D?
A. That is right. That is 33 feet 9, forward of that.

The Court: Forward of what?
The Witness: Of the bulkhead.

By Mr. Keating:

Q. Forward of the bulkhead marked P-P?
A. Of frame 120.

Mr. Jones: The wooden bulkhead is marked B-E, not C-D. That is in the 'tween deck and A-B is in the shelter deck.

By Mr. Keating:

Q. Do you remember when that bulkhead C-D was put in the ship?
A. Yes.
Q. Has it been there a long or a short time?
A. A long time.
Q. Now, disregarding the wooden bulkhead C-D, that space is served by two hatches, isn't it?
[fol. 570] A. This hatch is called No. 3 and this is called the No. 2 hatch.
Q. And we will mark that No. 2 and No. 3 with those figures. Now, how many ventilators were there in the two spaces?
A. Four in those spaces altogether.

Q. That is from the water-tight bulkhead R-S to the water-tight bulkhead X-Y?

A. Yes.

Q. Four ventilators as shown on the plan?

A. There is four ventilators to that point.

Q. Four ventilators to the point P-P?

A. Four ventilators from the bulkhead P-P to the water-tight bulkhead at frame 147.

Q. Which is marked R-S?

A. Yes.

Q. And then from the bulkhead P-P to the bulkhead X-Y how many additional?

A. Two bunker ventilators.

Q. Mr. Brakenbury, what are your duties in connection with the engineers on the various vessels of the Ellermans Wilson Line?

A. Well, every ship that comes into Hull, the engineer brings in his report for the voyage, into the office.

Q. Is that a report in writing?

A. A report in his own writing.

Mr. Keating: We will produce that report in the morning.

A. (Continued.) And I go over his reports when he brings them in and we discuss various matters arising in the voyage in the usual manner, that is, the amount of coal consumed—that is totaled and brought down and the quality of the coal, and the amount remaining, so that it can be decided what coal she will require for the next voyage. That particular coal arrangement is done separately by the [fol. 571] coal department. They bunker the ship, depending upon the amount of coal that is on board. They leave it to me whether they should have two or three days' reservation, depending upon the length of the voyage, and I get the total makeup.

In addition to that, the chief engineers bring requisitions for repairs, of repairs that have occurred during the voyage, either outward or homeward—any painting or other things that is not necessary to get done in a foreign port. The orders are sent to the workshop for the various repairs to be executed. In addition to that he brings in a list, a store list of stores that are necessary in an engine room. All that

is the duty of the engineer when he first comes in and that is done with every engineer on every ship.

Q. And you did that, Mr. Brakenbury, on all the voyages of the "Galileo"?

A. On her voyages when she came to Hull.

Q. Did you see the "Galileo" in the fall of 1925 in Hull or Newcastle?

A. I saw her in Hull but not in Newcastle.

Q. Had she undergone any repairs?

A. No. When she arrived in Hull we ordered a freezing machine. We were going to extend the refrigeration. I was on the ship three or four times for the fitting of the pipes, and space to put the new machine, and so forth.

Q. What time are you talking about?

A. I am talking of the Fall of 1925. I am talking of November, 1925. That is the last voyage it was in on in 1925. This machine was on order. I was on the ship several times with the draughtsmen, telling them what to do and stating where to put the various parts and subsequently to make a drawing.

[fol. 572] Q. In November, 1925, did you give Mr. Oxterby any written instructions about the care of his coal?

A. Yes; I handed him a form letter I had drawn up a few weeks previously.

Q. Is that a copy, Exhibit G, of the instructions you gave him?

A. Yes, that is quite correct.

Q. How did you give this to Mr. Oxterby?

A. I gave it by hand, personally.

Q. Did you ever discuss coal with Mr. Oxterby, other than written instructions?

A. Well, no more than I had discussed with all the engineers.

Q. I don't care what you did with the others. What did you do with Mr. Oxterby?

A. Every voyage when he came up we discussed the matter of coal loaded on board, also the condition of it, and every time impressed on his mind that one of his chief jobs —which is the ordinary routine of a chief engineer—was to look after his coal.

Q. What do you mean?

A. To see that nothing had to be done with it. It is entirely common sense. If there is any heating of the coal to have it removed, either removed or taken off the ship.

Q. Mr. Brackenbury, how long have you known Mr. Oxterby?

A. Well, I have known him over twenty odd years; fully that.

Q. Up until recently did you regard him as a competent engineer?

A. I regard him as a very competent engineer now—as an engineer.

Q. Did you prior to June, 1926, Mr. Brakenbury, with regard to the "Galileo" and the other ships in the Hull-New York run—where did you bunker them for the run?

A. We bunkered them in Hull.

Q. And where did you carry your surplus coal?

A. In the No. 3 tween deck, in the lower hold.

Q. Is there a wooden bulkhead in No. 3 tween deck?

A. Yes.

[fol. 573] Q. Is coal carried against it?

A. Yes.

Q. Did you have any trouble?

A. Never had any trouble that I know of.

Q. Did you know also that in June, 1926, there was a coal strike in England?

A. That is true.

Q. Did you have anything to do with the sending of instructions by cable, cable having been produced in evidence, Exhibit C, reading: "Bunker 'Galileo' round voyage"? Did you have anything to do with the sending of that cable?

A. No.

Q. You know nothing about it?

A. No, I didn't know the cable had gone, but there had been some talk about it.

Q. The matter was discussed?

A. The matter——

Q. Had you discussed the question of bunkering for the round voyage with Mr. Oxterby before he left for the June voyage?

A. No.

Q. You knew, didn't you, that you hadn't given him enough coal to get home?

A. On the June voyage the ship went to Rotterdam to take about 1,000 tons of coal there and it wasn't decided until after the ships had left that she was to be bunkered in New York for the round voyage, at least to my knowledge.

Q. Now, when she got back, following what I call the June

voyage, arriving in Hull, I think it has been testified, July 17th or thereabouts, did you go on board the vessel on her arrival back?

A. Yes, I was on the vessel several times.

Q. What were you doing?

A. In the ordinary way of duties. Going to see most of the ships whenever they come into Hull. We had to get the space all ready for the refrigerating machines on the next voyage she was scheduled to stop. She was to make another trip to New York and then we were going to fit the refriger- [fol. 574] ating machine when she came back from New York.

Q. Did you discuss the question of coal with Mr. Oxterby on that voyage, in Hull, before she came out to New York?

A. In the ordinary way we discussed the quality and what he had left and when he brought his report in.

Q. You went over his formal voyage report?

A. So it was, the formal voyage report.

Q. Who was it on the "Galileo" who had charge of the coal?

A. The chief engineer.

Q. Anybody else?

A. No.

Q. Did you go down in No. 3 tween deck and No. 3 shelter deck in Hull?

A. I don't know. I wouldn't like to say for certain. I am not sure of that.

Q. Did you know there was some coal in there?

A. Yes.

Q. You knew some coal had been carried in that space?

A. The chief engineer reported when he got to Hull that they carried coal in the No. 3 tween deck.

Q. And also No. 3 shelter deck?

A. Yes. Well, they always carried it more or less in there.

Q. How do No. 3 shelter deck and No. 3 tween deck compare as far as size?

A. The lower deck, No. 3 tween deck, is 33.9 long, and the shelter deck is 40.6 long.

Q. That is the only difference?

A. That is all, practically. Well, the shelter deck is 8.6 from deck head to deck head and the No. 3 tween deck is 10 feet.

Q. You have been carrying coal for a long time in No. 2 shelter deck against a wooden bulkhead forward, have you not?

A. In the shelter deck, yes.

[fol. 575] Q. No. 3, I should have said, instead of No. 2.

A. Yes.

Q. Have you been carrying coal?

A. Regularly in that space.

Q. Did you have any trouble with it on the "Galileo"?

A. No trouble at all.

Q. Can you state, Mr. Brakenbury, from your experience as an engineer whether or not it is usual and customary to carry your reserve bunkers, or coal in compartments, which are separated from cargo compartments by wooden bulkheads?

A. Well, it is a very common practice.

Q. Are you familiar with Mr. Milton's report, which is Exhibit 16?

A. Yes, I have read that report years ago, and I have read it since.

Q. And have you followed it right along through the years?

A. Well, it had not been modified through the years, except in 1927 there was a change, but is it approximately the same as to facts.

Q. Did your steamer undergo a survey by Lloyd's at any time between 1924 and 1926?

A. The vessel left Hull on the 22nd of November. She went to the Tyne, to discharge a Newcastle cargo and went into the dry dock, Palmer's Drydock, on November 25th.

Q. What year?

A. 1925. And while she was in the dry dock, she had received some damage at Halifax, specifications for the repairs were drawn up in Hull and put out for tender, and Palmer's got the order to do the work. She went into Palmer's Drydock, as I have previously mentioned, and while she was undergoing the repairs she was put through Lloyd's second No. 1 survey.

[fol. 576] Q. Is that one of the usual surveys?

A. It is one of the four years' special surveys.

Q. And following that survey did she get a certificate?

A. Oh, yes; she completed her survey before she left the Tyne.

Q. I show you Exhibit No. 17 entitled "Instructions to Surveyors, Board of Trade, Marine Department". Have you ever seen that circular before?

A. Yes, I am conversant with this.

Q. What does that pamphlet deal with, Mr. Brakenbury?

A. Surface ventilation of coal.

Q. What do you know about surface ventilation of coal?

A. Well, I know that it has been adopted by the Board of Trade, referring to that pamphlet, as the only ventilation necessary in a bunker, and it specifically instructs the surveyor to reject any through ventilation of coal by ventilators, that is, you can carry a ventilator down into the body of coal, that is, you have got to stop the ventilator at the deck head. The purpose of that ventilation is of course to carry explosive gas, marsh gas—CH^4—that is what the ventilators are for principally, to carry off the explosive gases.

Q. Where ought the ventilators to be put according to the pamphlet, Exhibit 17?

A. They should be of about the same size and placed at the opposite ends of the compartment or as far apart as practical.

Q. Is that the way the thing reads?

Mr. Jones: I object to that. The rule is: if he wants to give us the language of it——

Mr. Keating: No, it doesn't.

The Witness: It says here each hold or 'tween deck com- [fol. 577] partment in which coal is carried should be provided with at least two ventilators, one for inlet and the other for outlet. They should be of about the same size and placed at the opposite ends of the compartment or as far apart as practicable.

By Mr. Keating:

Q. Were the ventilators in No. 3 'tween deck placed as far apart as practicable on the "Galileo"?

Mr. Jones: That calls for a conclusion.

Mr. Keating: That deals with the construction of the ship.

The Court: I know where they were placed. I know they could have been placed further apart physically, but

whether it would be necessary to do so is another matter that you can ask him, if you wish.

By Mr. Keating:

Q. What have you to say about the ventilators leading down into No. 3 'tween deck as regard their positions?

A. Well, the positions of the ventilators are about 32 feet athwart, that is taken from that drawing—about 32 or 33 feet athwart.

Q. That is the distance between them?

A. That is the distance between the ventilators, and this space being only 33.9, obviously you have got a better draft of ventilators athwart than if forward and aft. Too, another point about those ventilators in this space: At the after end of this space there is a hatch 15.3 feet long and 18 feet wide. Well, to put those ventilators at the ends of this space you would have to put your bridge wing beyond [fol. 578] the center line of the ship to get any sense out of it. You couldn't put the aft ventilator through the arch. You have got to ship it to the side, so I consider the ventilators as shown on the plan much more efficient for surface ventilation than if they were put at the end. I don't think the Board of Trade would have taken any exception to this. As a matter of fact, they couldn't ask—the pamphlet is not retrospective. If you refer to page 9——

Q. Suppose you refer to it.

A. "Paragraph 18: Appliances at least as effective as those specified. Any ventilator or other appliance which, in the opinion of the Board of Trade, is at least as effective, in all respects, as an appliance specified in this circular, will be accepted as fulfilling the requirements of the circular." Now, I take it that that clause gives the surveyor a certain amount of latitude with regard to the position of those ventilators. That is my reading of it.

Q. Never had an explosion in this space, did you?

A. Never.

Q. The owners, that is the Ellermans Wilson Line, Limited, Hull, have you as a superintending engineer at Hull; is that correct?

A. I am; that is correct.

Q. Have you any assistants?

A. Yes, I have two assistants in Hull.

Q. Do they maintain a marine superintendent?

A. Yes.

Q. Has he any assistants?

A. One.

Q. Does the Ellermans Wilson Line have a marine superintendent in New York?

A. Oh, no, certainly not.

Q. Do they have a superintending engineer in New York?

A. No.

[fol. 579] Q. Who has to do with the coal, its stowage and care and inspection while the vessels are in New York?

A. The chief engineer.

Q. Anybody else have anything to do with it?

A. Not at all.

Q. Have you ever heard of a man named Isbister?

A. Well, I have heard his name once before I arrived in New York, and have heard it several times in this room. I have never seen him; I have never written him. But I understand that he is a sort of shore superintendent for the Ellermans Bucknell Line, but I have never done any business with him or given him any instructions.

Q. He has nothing to do with your department?

A. Nothing at all.

Q. Who runs your department?

A. I run it.

Q. Mr. Brakenbury, what have you to say about carrying or loading new coal on old coal?

A. Well, it is a practice which is almost universal. I am going to say certainly very, very common. The instructions I gave in that circular was to stop as much of that as possible—work each bunker——

Q. Now, you are referring to your instructions to Exhibit G?

A. That is right.

Q. What effect would your instructions have had if they were obeyed?

A. There couldn't be any coal kept in the ships for any length of time if they worked it around.

Q. Worked what around?

A. Bunker by bunker, alternately.

Q. How much coal does the "Galileo" burn in a round trip?

A. Averaging about 1400 to 1500 tons.

[fol. 580] Q. So every time she made a round voyage, including her stay in New York she used up 1500 tons of coal?

A. That is true.

Q. If the engineer, Mr. Oxterby, had used each bunker alternately, how long would it take him to exhaust all the coal on the ship?

A. Well, in the ordinary way, that is, to have nothing, I should think about a voyage and a half, that is, a complete round voyage and a half; he would be able to work right around the bunkers. That means in about 12 weeks, 11 or 12 weeks, all tne bunkers should have been skimmed right around.

Q. If your instructions had been obeyed?

A. Certainly.

Q. Did you follow the engineers to see that that was done?

A. I didn't follow them every voyage. They got their instructions to carry out and they would do it. One of the objects of that form was to get them to send in a return at the end of the year to find out how each and every ship stood with respect to the amount of coal on board and the time it had been on board. We had a sort of yearly balance sheet.

Q. Now, Mr. Brakenbury, do you approve or do you not approve of No. 3 'tween deck, as described, and as you have seen it, as a place to carry coal?

A. In my opinion I think it is a very good place to carry coal.

Q. Give your reasons.

A. Well, in the first place, for bunker coal, it is essential to have it in a position like that so you can get it through to your fires, and second is, it is 23 feet from the after end of that to the front of the bulkhead. It is a fairly long distance—it is the after end of the permanent cross bunker, forward side of the permanent cross bunker. It is in a [fol. 581] better and cooler place than the permanent bunker in the ship is.

Q. What about the place as a suitable place to prevent any undue air getting at the coal, except for surface ventilation? What would be that feature of the place?

A. Well, I understand that this is a wood bulkhead and they tell me you can't make a wood bulkhead absolutely

tight, but a bulkhead of the description described in this room, I think, would let a very, very small amount seep through.

By the Court:

Q. The forward bulkhead on the permanent bunker; was that made in the same way as this wooden bulkhead between 2 and 3 on the 'tween decks?

A. The forward bulkhead? The after bulkhead is steel.

Q. I mean the forward bulkhead of the permanent bunker. That is wood, isn't it?

A. The forward end of the bulkhead was wood.

Q. Was that made in the same way as the wooden bulkhead between 2 and 3 in the 'tween decks?

A. No, I didn't see those bulkheads for a long time, but I understand that in the case of the forward bulkhead, in No. 3, had a vertical plank and the after end had a horizontal plank.

Q. But aside from the way the planking was run, was the means of sealing the planks the same?

A. Yes; a batten at each side, that is, between each of the planks there was a batten nailed on each side, that is, the bulkhead between the permanent bunker and the extension, the No. 3 tween deck bulkhead, that cargo space—it was cargo space on the forward side of that bunker, sup- [fol. 582] posed to be a cargo space—and that ship was built with no bulkhead in it at all. The center of the hatch, as I said before, was built in with steel, and wings at the side, and that was the after end, the forward end of the permanent cross bunker.

Mr. Keating: Has your Honor got it perfectly clear that the bulkhead you inquired about was steel in the center and steel in the wings?

The Court: Oh, yes. I wanted to know if that was the regular permanent bunker, as I understand it.

The Witness: Oh, yes, sir.

By the Court:

Q. And on occasions in the past it was used as the sole bunker on the tween deck level?

A. That is so.

Q. And I was wondering whether the means of sealing it was the same as the sealing of the temporary bulkhead.

A. Yes. All the seams are battened in the same way.

By Mr. Keating:

Q. Whose duty on the "Galileo" was it to see that the forward wooden bulkhead was as tight as possible?

A. The chief officer.

Q. That is his particular job?

A. That is his job.

Q. Now, Mr. Brakenbury, if you had been present on August 24th or 25th, 1926, in New York, and you wanted to take some extra coal and you found with respect to No. [fol. 583] 3 shelter deck and No. 3 tween deck that there was some coal left there, we will assume it was 160 tons, what would you have done if you had been there yourself?

Mr. Jones: I object.

The Court: I sustain the objection.

Mr. Keating: Exception.

Q. Mr. Brakenbury, would you consider it safe and proper to load new coal into that compartment on top of 200 tons of old coal, provided a very careful inspection of the old coal was made and found not heating?

A. Yes, I think it is a very safe thing to do. It is the only thing you could do. After a careful inspection I don't see any reason why that new coal would not be put on top of the old coal.

Q. Now, if the inspection showed it was heating, what would be done?

A. It is a question of degree. If it was very warm and facilities on the ship permitted, the coal would be laid out to cool off and put back.

Q. Mr. Milton, as I recall, in Exhibit 16, makes the recommendation with respect to what should be done with fresh coal taken in on top of old coal. The recommendation is that the old coal should be trimmed into position so it will be used up first. Do you recall the recommendation I am referring to?

A. Yes.

Q. What have you to say? Do you agree with that?

A. I do, so far as those recommendations are made with the idea of doing the best possible under all circumstances. The recommendation also states that the coal has got to be moved into such a position that it can be used up on the next voyage. There are those considerations to be [fol. 584] taken in before you decide whether Mr. Milton's rule should be applied without any reservation. I don't altogether agree with Mr. Milton in some things he said. At least, the doors would have to be——

Q. I only want to confine this to the coal at the moment.

A. I agree with the recommendations that Mr. Milton made, so far as possible, but I don't think it is always necessary that coal should be taken out or even moved when you have got to put new coal on top of old. Under the circumstances of the "Galileo", I think we agreed with Mr. Milton's recommendation when he says it was to be taken on in such a position that it would come out in the next voyage.

Q. In other words, all the coal in No. 3 tween decks would have been taken out if the "Galileo" had finished her voyage which she started?

A. She sailed on the 29th of August; she would have been at Hull on the 14th of September; it would have been about the 17th of September, 20 days on the outside.

Q. Now, Mr. Milton suggests that it be used on the next voyage. Does he specify what the length of the next voyage is?

A. No, makes no specification of what it is.

Q. Was there anything more definite in the recommendation than the suggestion "Voyage"?

A. No, I don't think so.

Q. Are there any voyages that last to three and four weeks?

A. Oh, yes, sir; more than that even.

Q. What is the length of some of those far eastern voyages from New York, in days?

A. Forty days, something like that; it just depends on the speed of the ship.

[fol. 585] Q. Do you agree in principle with the suggestion that so far as possible the old coal should be worked out of the ship first?

A. Yes, I do.

Q. And in the instructions which you gave in November, 1925, to Mr. Oxterby, Exhibit G, did you attempt to carry that out?

A. Always.

Cross-examination.

By Mr. Jones:

Q. As I understand you, Mr. Brakenbury, you are in full charge of all the ships of the Ellermans Wilson Line, in so far as any matter relating to the bunkers are concerned?

A. Relating to the engineering department.

Q. You are the supreme authority of the company on coal?

A. I explained that in one of my answers. I didn't order the coal; I didn't put the coal on. It is dealt with by the coal department in Hull. I don't know what the coal department——

Q. But in so far as the engineering department on board your ships are concerned, you are the supreme authority of the Ellermans Wilson Line, Limited?

A. Yes, I am the superintending engineer.

Q. And any higher authority in the company in the engineering department?

A. No.

Q. You knew that the "Galileo" was using 'tween deck No. 3 for the purpose of carrying coal on the voyage June, 1926?

A. I knew that when she arrived in Hull.

Q. Who sent the cable from Hull respecting the 850 tons of coal that were to be carried by the "Francesco"?

A. I cannot tell you that.

Q. Some other person in the Ellermans Wilson Line than yourself?

A. Oh, certainly.

[fol. 586] Q. I mean who could do that there? Some other officer?

A. I don't know that.

Q. You weren't consulted about that?

A. Never mentioned.

Q. Now, in this Exhibit G; you say this is particularly drawn in this matter on account of recurrent fires taking

place in the bunkers of various steamers? I suppose you are familiar with the pamphlets published by the Board of Trade, in which there were some entries on fires as occurring in various bunkers on British ships?

A. I have read that; yes, sir.

Q. And was it that pamphlet you had in mind when referring to recurrent fires taking place in bunkers of various steamers?

A. No, I don't think it was

Q. Well, then, what did you have in mind as to recurring fires taking place on various steamers? Your own steamers?

A. No, very few.

Q. What steamers were they?

A. You are always reading in the technical papers and reports in the commercial papers of ships having bunker fires at sea. Also we had given instructions, verbal instructions, to the same effect as that letter. I designed that letter so as to crystallize those instructions, so that none of the men could have any excuse for not carrying out the instructions.

Q. Did you know that the danger of these bunker fires had grown to alarming proportions and therefore you sent that letter out?

A. I don't think there was such a bad period in 1925. 1921 was the worst time in the world for bunker fires.

Q. But the thing had gotten to such a position that you [fol. 587] felt it was necessary to warn people of the great danger that existed from those bunker fires: wasn't that it, Mr. Brakenbury?

A. That is so. Each one of my engineers got it.

Q. And the people in the steamships generally recognize the great danger from these bunker fires: that is correct, isn't it?

A. I wouldn't put it like that. Wherever you use coal there is danger and everybody connected with bunkers or working coal are alive to the danger.

Q. Then people became exercised in recent years about this danger, to eliminate it?

A. To some extent I believe they have.

Q. And it is perfectly feasible to eliminate, isn't it, Mr. Brakenbury?

A. Well, it is possible to do anything, but it may be very, very impracticable.

Q. The whole matter is a matter of expense, isn't it?

A. I didn't say that at all.

Q. One moment. You realize, do you not, if you were to have what I call through ventilation through the mass of coal, that you practically eliminate the danger of spontaneous combustion in coal?

A. Yes. I understand so.

Q. And you realize that it is entirely feasible and practicable to fill a bulkhead in a bunker that is air-tight?

A. It is possible. Everything is possible, but if you take an ordinary ship, any cargo ship or almost any ship you can speak of, there is not a single bunker on that ship that is water-tight.

Q. You know that in a steel bulkhead there is practically no air that goes through the steel bulkhead? *A.* Why not?

A. It is not water-tight.

Q. Any steel bulkhead after it has been in the ship accumulates a certain amount of rust, doesn't it?

A. It does, and corrodes.

[fol. 588] Q. And the only possible place for air to get through a steel bulkhead is where those plates on the sides of the bulkhead overlap?

A. But the seams——

Q. And the seams are riveted together?

A. Yes.

Q. And it rusts in between the seams; that is true?

A. To some extent.

Q. And in a short time it makes an air-tight wall?

A. I don't agree with you; not necessarily. I think you have no more right to ask if a non-water-tight bulkhead rusts tight than to assume that a water-tight wooden bulkhead will do the same thing with dust.

Q. Those steel plates are overlapped, aren't they?

A. Yes.

Q. And riveted together with steel rivets?

A. Yes.

Q. And the steel rivets are driven home so as to make as tight a joint as you can?

A. That is a matter of construction. That is quite right.

Q. Your wooden bulkhead is built that way?

A. No, not built like that.

Q. Now, in the matter of constructing the wooden bulkhead, it is entirely feasible to fit what I shall call the sill

piece so it fits on the deck and makes a close fit with the deck?

A. Certainly.

Q. And it is also entirely possible to cover the bulkhead with heavy paper, isn't it?

A. Well, it is feasible to do it but I prefer to have battens on a bulkhead.

Q. And it is also possible to make the bulkheads double?

A. You can do lots of things.

Q. That is true, isn't it, you can do it?

A. Yes, you can make a double bulkhead if you think it is necessary.

[fol. 589] Q. What is the explanation of constructing one of those bulkheads?

A. Well, in regard to the sill, as you are speaking about, I couldn't give you information. That bulkhead was built by the shipbuilding yard and by ship's carpenters and would be in first class shape. I have never seen a sill fitted to a ship's deck without being bedded.

The Court: Have you any recollection about this sill?

The Witness: Not the slightest.

By Mr. Jones:

Q. It should have been bedded, should it not?

A. I don't know. It should be bedded unless an equally good means is taken to make it tight.

Q. I say it should have been bedded?

A. I didn't say so; or an equal means of making the bottom tight. There are other ways. You could stem it with wood. I don't know how it was made.

Q. That is what should have been done but you don't know?

A. I don't know anything about that bulkhead.

Q. Now, when was this bulkhead put in the ship?

A. I don't know.

Q. What was the first knowledge you had of the extension of the bulkhead?

A. Several years.

Q. No, before this occurrence.

A. Oh, yes, sir.

Q. Now, you have told us about old coal—about new coal on top of old coal. Did you ever discuss that matter with Mr. Oxterby before this occurrence on the "Galileo"?

A. No, I never discussed that with him. That is a matter that comes in the province of an engineer; it is part [fol. 590] of his job and business. The coal is absolutely in his charge. It is his duty to go through the bunkers regularly and see, watch the coal and see it isn't heating and to take any steps that are required at sea, or in port, wherever he may be, to have coal moved if it may be necessary, and if it fired or got very hot to have it taken off. That is a job that is naturally in his province.

Q. Now, in this circular of October, 1925, you said, "Will you please note all bunker coal must be worked out of every bunker; consequently see that no coal shall be left in the bunker any length of time; also as each bunker is emptied it must be swept down of small coal and dross removed and burned." What was the purpose of that instruction?

A. To insure that they would carry out the verbal order that had been given them continuously for years. The purpose of that instruction was for to crystallize or to put on record the verbal instructions which the engineers have been used to get for years; for years back, and to have a record for them to send in. If you put it another way, to make it more of a system than it had been.

Q. So you had had some oral communications with Mr. Oxterby with respect to this matter of old coal, before you issued this circular of October, 1925, Exhibit G?

A. After—I thought you said about putting new coal on top of old coal. I don't think I had any talk with Mr. Oxterby about that except in the general way.

Q. Doesn't this circular deal with the matter of old coal?

A. Yes.

Q. Now, what is the purpose of sweeping up a bunker so that all small coal and dross should be removed, unless [fol. 591] there is some danger from putting new coal on old coal?

A. The idea, when you get a bunker and you sweep out all the small stuff. Everybody knows that is more liable to fire than lump coal, but there is nothing in that letter that can be inferred, in my opinion, nothing can be inferred that any engineer can take new coal on old. It may be worked out of a bunker alternately.

Q. You saw the coal that was taken here in New York in June on the "Galileo"?

A. I don't know as I saw it; I said I wasn't sure whether I was in the bunker.

Q. Now, Mr. Brakenbury, as a marine engineer in charge of all the operations of your company: when you switched from the coal which you had been in the habit of using to a new type of coal, do you mean you didn't examine the new type of coal your ships were using?

A. I think you are wrong. We had been using the same coal. We didn't switch from the Morrisdale coal.

Q. I must have formed an erroneous impression. Mr. Brakenbury, in reply to a question from Mr. Keating, I had the idea that up to this June voyage you had been using Newcastle or Hull coal and it wasn't until this June voyage that you used any American coal at all. Am I wrong?

A. Yes.

Q. So you had been using American coal during all that time and had been bunkering over in England?

A. No. Whenever the engineer was short he got whatever coal he required in New York, which was Morrisdale coal.

Q. You are familiar with the type of coal known as the Morrisdale coal?

A. Yes.

Q. And you know that it had a considerable number of finds in it, just as one of your men testified?

A. Yes.

Q. You said distinctly that you knew those finds were [fol. 592] liable to heat if other coal was placed on top of it?

A. I don't know of the extent of finds in this coal. I didn't accept this coal. The chief engineer reported to me when he arrived at Hull, that is July 17th I think he arrived at Hull, he left here June 30th, and he informed me that the coal had been put in the No. 3 tween deck bunker and that it was quite all right. I couldn't tell you from memory about the quality.

Q. You don't deny that you went on board the "Galileo" when she was at Hull in June, 1926?

A. I don't, no, but I will deny that I was ever in the bunker.

Mr. Jones: I move to strike out the latter part of his answer as not responsive.

The Court: I will allow it to stand and give you an exception.

By Mr. Jones:

Q. Coming to this question of ventilators: if you wanted to get the full use of the two ventilators, to get them as far apart as possible, couldn't you place them diagonally in the compartment?

A. Yes, it would leave two bad corners.

Q. What two bad corners would it leave?

A. Well, it just depends on the way you place the ventilators if you put them in the two corners, there wouldn't be ventilators in the other corners.

Q. Putting two ventilators in the after part leaves two bad corners in the forward part, doesn't it?

A. Yes, to some extent, yes.

Q. And as a matter of fact, you know you put four ventilators two on one side and two on the other, to get proper ventilation?

[fol. 593] A. I don't think you could mention any case. I think that is a very good position, as I previously said.

Q. You recognize, Mr. Brakenbury, that these ventilators weren't placed in accordance with the regulations of the Board of Trade?

A. Yes, they were when the ship was built.

Q. I call your attention to Exhibit 18-B and ask you what apparently is a ventilator.

A. That (indicating).

Q. Where does that ventilator lead?

A. Lead?

Q. Yes.

A. Leads down to No. 3 lower hold and No. 3 tween deck and No. 3 shelter deck.

Q. Then there is apparently another ventilator, Mr. Brakenbury. Where does that lead?

A. To the lower bunker, cross tween deck bunker, and shelter deck bunker.

Q. Now, what was the first time that you learned of the fact that Mr. Oxterby, as you say, hadn't told you the truth about the origin of this fire?

A. On October 25th, 1929.

Q. What did you do then?

A. What could I do?

Q. You could have discharged Mr. Oxterby if you were convinced he hadn't told you the truth.

A. He was on the "Sythia" when he told me this.

Q. I think you said October 25th. Of this year?

A. I said 1929.

Q. When did you first learn of the fact that this Magarelli man told you about this hot coal?

A. Magarelli didn't—what?

Q. When the Italian stevedore said the coal was hot.

A. Early 1928, perhaps middle of 1928.

Q. What did you do about it?

A. As soon as I saw Mr. Oxterby after that I pointed out to him the statement that Mr. Keating had sent to Hull regarding the Magarelli statement, and I told him "What [fol. 594] have you to say about that? Is this statement that Magarelli made true?" And he said, "No, there is not a word of truth to it." Now, I repeated that question within a month of leaving Hull. I repeated that question to him in the middle of August, and he had been waiting in Hull to come out here for this trial, and I never missed asking him that question because I wanted to be sure he was quite firm on what he was saying, and up to the morning of the 25th of October, 1929, I thought Mr. Oxterby was speaking the truth; and when we came up from breakfast on the morning of that day, and we were walking up toward the salon, he said, "I would like to speak to you." He came to my room and told me that what Magarelli had said was true.

The Court: What did he say was his reason for telling you?

The Witness: He didn't tell me, but he said he couldn't take his oath and give evidence and deny that statement of Magarelli.

By Mr. Jones:

Q. Did he say the coal was in fact hot or——

A. He told me the coal wasn't hot; the coal was slightly warmer, no warmer than usual, and why he made this statement he didn't know, excepting that he—I don't know; I can't answer for him at all, but I know this much: when he told me that I got a bit of a shock.

Q. Did you ask him why he made this misstatement to you?

A. Yes.

Q. What explanation did he give?

A. He had none to give.

[fol. 595] Q. What did you say to him?

A. I said it was a very serious matter and the first thing would be to get hold of Mr. Keating in New York. So I arranged instead of coming to New York with his ship to go ashore at Boston, on Sunday, October 27th.

Mr. Keating: You brought him to my office.

The Witness: Brought him to your office.

Mr. Keating: I got a shock too.

By Mr. Jones:

Q. Did you institute any investigation when you received the report as to this Italian stevedore's statement which was so contrary to Mr. Oxterby's, to ascertain which of the two was the truth?

A. I don't see how I could have made any investigation of the matter. Magarelli was in New York and Mr. Oxterby told me that Magarelli's statement was untrue and that is all I can tell you.

Q. Did you question any of the other engineers on the "Galileo"?

A. They knew nothing; I couldn't say whether I did or not.

Q. So far as you know, you said nothing about that to them?

A. Well, I only got the thing itself, Mr. Jones—I think your statement was sent to us March 31st, 1928—it was a long time floating about our place before I got hold of it, and last August when I saw it. The first time I saw the report, Mr. Oxterby was away then.

Q. I understand you to say that the first you knew of the Italian stevedore's report was some time in 1928. Now, you just told me that the first you knew of it was in the summer of 1929: is that correct?

A. No. I said 1928.

[fol. 596] Q. Now, when you say last summer you don't mean the summer just past; you mean the summer before?

A. Yes.

Q. So you had from the summer before last up to the present time to find out from those other engineers what they had to say?

A. I did nothing. I asked the engineer and took his word as a truthful man. Why should I doubt him?

Q. Well, you knew that the Italian stevedore stated to the contrary?

A. Yes. I will have to prefer Mr. Oxterby to the stevedore.

Q. In other words, you paid no attention whatever to the stevedore's statement?

A. What could I do? I asked Mr. Oxterby repeatedly whether that statement was true. When I say repeatedly, I asked him several times, and I had his assurance it wasn't true, that Magarelli had never spoken to him about that coal question.

Q. And you made no inquiry whatever of the other engineers on the ship as to what they knew about it?

A. No, I didn't.

Q. You have bunker fires on your other ships?

A. We have had bunker fires occasionally.

Q. Well, now, about this same period you had bunker fires on the "Morango"?

A. Yes.

Q. Did you tell Mr. Oxterby about those fires?

A. I don't know whether I did. I may have.

Q. You knew about them?

A. I knew there had been a fire.

Mr. Keating: The "Morango" fire happened afterwards, the 11th of October, 1926.

By Mr. Jones:

Q. On August 21st, 1926, page 15, there was coal on the port shelter deck very heated, working it out; that was [fol. 597] called to your attention, wasn't it, on the "Morango"?

A. Yes, I remember something about it.

Q. And there was an entry on August 23rd: "Engaged in working coal out of No. 3 on starboard side shelter deck. August 25th: Reached fire starboard side shelter deck No. 3. August 26th: Coal still heated on starboard side shelter deck. Engaged in working it out." You knew about that, didn't you?

A. I forget the details now.

Q. So you did have considerable trouble with fire in your shelter deck and tween deck with wooden bulkheads?

A. We never had any serious fire, but occasionally you always have—because of coal heating, you can't possibly carry coal in 60 ships without having places of heating and possibly some cases like the "Morango"; but never had a case of anything serious.

Q. Had the Ellermans Wilson Line 60 ships?

A. We had 60 ships at that time.

Q. The Ellermans Wilson had 60 ships during 1926?

A. Approximately 51. Those ships are run from our office. I am superintendent for those and I think it includes 51 ships at present. I would like to be clear; it may be one or two more or less, but I am speaking about 1926.

Q. You have told us about the New York-Boston-New castle run. What other services?

A. They trade all over the world.

Q. You have regular services?

A. Regular services up the Baltic; Scandinavia, Norway.

Q. They are short runs and small steamers?

A. Yes, sir.

Q. What other services?

A. Steamers up the Mediterranean, small and large.

[fol. 598] Q. That is a short service?

A. Pretty near as long a voyage as Hull to New York.

Q. How many ships have you in the Mediterranean service?

A. Possibly a dozen.

Q. How many in the New York service?

A. Four or five.

Q. What other services have you beside the Scandinavian, Baltic, Mediterranean, New York?

A. Bombay, Karachi, Calcutta and the Far East.

Q. Under what names do they operate?

A. Under the Ellermans Wilson.

Q. How many ships have you in that business?

A. Well, four sailing regularly to Bombay and the East.

Q. They are all just freight service?

A. Oh, no; we have a passenger service from Hull to Oslo.

Q. Coming to the fire you had on the "Morango", have you any explanation to offer why the fire occurred in the

"Morango" in the shelter deck near the bulkhead similar to the one you had on the "Galileo"?

A. I haven't.

Q. What do you do, Mr. Brakenbury, to see whether your instructions were followed?

A. Well, they send in a report at the end of the year.

Q. Did you ever go on board your ships to ascertain whether the report was correct or incorrect?

A. You must understand that a number of our ships don't come to Hull. They may be running out for months and in those cases we aren't able to visit the ships for months.

Q. You were interested only in the ships that run to Hull?

A. I am interested in all the ships.

Q. Did you go aboard the ships that run to Hull to ascertain——

A. I asked the engineers whether they are carrying out those instructions and I have always been assured they do. [fol. 599] Q. Did you never make an investigation of your own?

A. I couldn't go and see whether the bunker is cleaned out

Q. A man cannot sit in his office chair and never go anywhere and ask people questions: is that right?

A. You think I am a man sitting on a chair doing nothing? There is nothing that goes on on those ships that I don't go to see.

Q. Did you go aboard of your ships to see whether your instructions were carried out?

A. I went to see whether they were carried out; that included the coal as well.

Q. And you went on board the "Galileo" to see whether those instructions were carried out?

A. At various times.

Q. When she got there in July?

A. I was on board in July, yes.

Mr. Keating: If the Court please, I want to offer the deposition of John J. Chapman, chief engineer of the "Morango", deposition taken in this case with reference to the fire on the "Morango". I would like to state to your Honor that that fire occurred in the permanent bunker.

The Court: Have you any objection to this?

Mr. Jones: Oh, no, I cross examined the witness.

Mr. Keating: Mr. Jones brought an action in this Court arising out of the "Morango" fire. When the testimony was taken Mr. Jones abandoned his suit and the suit was discontinued by Mr. Jones.

The Court: What does that prove?

Mr. Keating: I move to strike out all reference to the [fol. 600] "Morango" fire in Mr. Jones's cross examination and, if your Honor will grant the motion, I will withdraw the deposition.

Mr. Jones: There were two "Morango" fires, one in the permanent bunker and one in the shelter deck. It has nothing to do with this situation. The shelter deck is in an entirely different place, and the fire occurred on August 21st, before this one.

Mr. Keating: I dispute that statement of fact. It wasn't in the shelter deck. It was up in the boiler room section.

The Court: Let the record stand as it is with everything in it that has not been objected to, and let it stand that way. If there is something else you want to offer in the way of evidence I will rule on it.

Mr. Keating: Everything that Mr. Jones said about the "Morango"? The deposition stays in?

The Court: I will allow it to stand as it is.

Mr. Keating: What about my statement that Mr. Jones brought an action?

The Court: That is out.

Mr. Keating: Mr. Jones, are we trying the Cudahy case as well?

Mr. Jones: I understand that before your Honor is also the case entitled Cudahy Brothers Company et al. against Ellermans Wilson Line, Limited, owner of the Steamship "Galileo", respondent, No. 134.

The Court: Stipulate both cases tried together?

Mr. Jones: Yes, sir.

[fol. 601] Mr. Keating: With respect to that case, your Honor, the bills of lading weren't put in and I find only three out of four bills of lading. May I have those marked in evidence with the understanding that when we get the other bill of lading——

Mr. Jones: I may be able to get that for you.

Mr. Keating: In the meantime, I offer them in evidence.

Mr. Jones: In addition I will stipulate that any missing bills of lading that you want to put in and I want to put in may be filed.

Where are the bills of lading issued by the steamer? These seem to be railroad bills of lading.

Mr. Keating: No, those are through bills of lading.

The Court: Let that rest for the moment.

Mr. Keating: With the understanding that I have an opportunity to put those bills of lading in when produced by Mr. Jones, and also producing those documents that I mentioned to Mr. Jones, I rest.

Mr. Jones: If your Honor please, I understood Mr. Keating was going to put Mr. Ellison back on the stand.

The Court: All right.

FREDERICK ELLISON, recalled by the respondent, further testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Ellison, was the grain feeder that led down into the lower hold full of grain or not?

A. It was full of grain.

[fol. 602] Cross-examination.

By Mr. Jones:

Q. How many battens did you find were broken in August, 1926, when you looked at the bulkhead in No. 3 tween deck?

A. Well, I couldn't tell you.

Q. Can you give me any idea?

A. I couldn't.

Q. A large number or small number?

A. I couldn't say.

Q. Have you any recollection of the subject?

A. Not at all.

The Court: We will adjourn until tomorrow morning at 10:30.

Whereupon an adjournment was taken until tomorrow morning, Thursday, November 13, 1929, at ten-thirty o'clock.

New York, N. Y., November 13, 1929.

Met pursuant to adjournment at 10:30 A. M.
Present: Same as before.

WILLIAM P. BRAKENBURY, recalled by the respondent, resumed the stand and testified as follows:

Direct examination.

By Mr. Keating:

Q. Mr. Brakenbury, I just received this document—in fact, I received the two documents, per S. S. "Majestic". Will you look at this particular document and tell me what it is.

A. This is a voyage report for the S. S. "Galileo", for voyage commencing May 24th, 1926, and completing July 19th, 1926.

[fol. 603] Q. Completing at Hull?

A. Completing at Hull.

Q. Was that Mr. Oxterby's report?

A. It is Mr. Oxterby's report, signed by him.

Q. And this report was a similar report to those he makes at the end of every voyage at Hull?

A. Yes.

Q. And the report you hold in your hand is the report of what I call the June voyage?

A. Yes.

Q. The last day the vessel was in Hull?

A. That is correct.

Mr. Keating: I ask that it be marked in evidence.
Mr. Jones: No objection.

(Marked Respondent's Exhibit 29 in evidence.)

REBUTTAL

S. W. PARR, recalled as a witness on behalf of the libellant, testified as follows:

Direct examination.

By Mr. Jones:

Q. Professor Parr, I am going to ask you some questions with respect to the time during which the coal shows an avidity for oxygen. Will you tell us during what period of time coal shows an avidity for oxygen?

A. I don't know of any data that has been continued quantitatively, that is, with actual determination of the time that oxygen shows an avidity for coal, for one series of tests extend over 36 weeks and the other 46 weeks. I [fol. 604] have also data for six years but not in the same quantitative fashion. After 46 weeks the avidity was still active.

Q. Is there anything from the data which you took for six years which will give you any data?

A. I have no measurements at the end of six years. The measurements were in the first instance directed for 46 weeks, ten and a half months.

Q. Did you make those measurements yourself?

A. I did, yes, sir.

Q. And those show a marked avidity for oxygen at the end of 46 weeks?

A. Yes, sir.

Q. And throughout that entire period from the time you began to make your tests?

A. Yes; it was more active the first few days than in the last period.

Q. After the first several days how did it continue then?

A. Evenly for the entire time.

Q. And it showed a marked avidity throughout that time?

A. Throughout that time.

Q. Now, Professor Parr, is there a difference between what we call surface ventilation and through ventilation?

A. There is.

Q. Explain what that difference is?

A. Surface ventilation removes continuously the air in contact with the surface of the coal. Through ventilation

involves the admission of air into the mass and passing through the mass and out, taking an entirely different passageway, a different route from the other.

Q. Is surface ventilation considered desirable or undesirable?

A. It should be provided for in order to remove any possible gases that come with the coal, which may cause explosive conditions over the coal. It has nothing at all to do with oxidation conditions.

[fol. 605] Q. Is through ventilation considered desirable or undesirable?

A. It is absolutely undesirable unless it can be so complete as to carry away any heat that is generated, which is practically very difficult.

Q. Is it considered dangerous?

A. It is dangerous.

Q. Assuming that coal is placed in No. 3 tween deck so that it is piled around the forward end of the space and around the side, and lies against the sides and bulkheads in such a way that the top of the pile is about three feet from the top of the bulkhead, and the coal is inclined so that the bottom of the incline is about two feet from the square of the hatch shown on the drawing, and some coal remains in the compartment from June 30th, 1926, until August 28th, 1926, and the bulkhead which forms the forward end of the compartment is constructed of wood consisting of planks three inches in thickness and about ten inches in width, the planks are said to have been planed and fitted close together with battens nailed over the seams on both sides of the seams, the planks being fitted with slots, both at the top and bottom of the bulkhead, the slots consisting of beams of wood, as shown on the drawings prepared by the mate, and the beams resting on the deck but not fitted to the deck so as to close the openings formed by the overlap of the deck plates, are you in position to say whether or not such a space is a safe place in which to stow the coal which has been described in this question?

A. I am.

Q. What is your opinion?

Mr. Keating: If your Honor please, I object to that ques-

[fol. 606] tion on the ground that while Professor Parr is

qualified as a coal expert, this question involves knowledge of ships and a construction of ship bulkheads and a knowledge of all the features that enter into the ventilation or non-ventilation of a ship's space.

The Court: Well, you want the question overruled as to the facts?

Mr. Keating: No, I object to this witness being asked for an expert opinion that involves a ship's construction.

The Court: I overrule your objection with an exception.

By Mr. Jones:

Q. Is the place safe or unsafe?

The Court: Just with reference to spontaneous combustion. Safe or unsafe with reference to the question only of whether or not the coal might cause fire spontaneously.

The Witness: It would be unsafe.

Q. Will you state your reasons for saying it is unsafe?

A. The opportunity for air to enter the mass of coal and produce through ventilation is evident to my mind, and the piling of the coal would of necessity segregate and create voids throughout, so the through ventilation could proceed readily. This through ventilation beginning at the bottom of the pile would be in the worst possible place for such ventilation to start. There is no spontaneous combustion of the coal at the surface. That never happens. It always starts in the interior of the mass and, in my opinion, this [fol. 607] condition as shown here would be exactly in line for a dangerous situation to take place.

Q. I show you figure 6 appearing on page 6 of Exhibit 28, and I ask you if that diagram illustrates what you have just told us?

A. It does.

Q. Now, keeping in mind the description which I gave you of the bulkhead, the wooden bulkhead at the forward end of compartment No. 3, which portion of that bulkhead, with respect to its top and bottom, is most important that it should be made tight?

A. The bottom.

Q. Assume that at New York, before the fresh supply of coal, which I have described to you before, was placed in this compartment, tween deck No. 3, the chief engineer puts

his hand in up to his wrist in the mass of coal, he felt the coal with his hands and arms and wasn't able to detect any decided degree of temperature from so feeling the coal; would you be of the opinion that the compartment was still unsafe for the purpose of carrying coal?

A. I would.

Q. Give us your reasons for so saying.

A. Spontaneous combustion doesn't start at the surface, as I have already said, but down within the interior of the mass. My own explanation of fires shows it to be at least four or five feet below the surface, where the heating begins. In one of the exhibits, the one by Mr. Huff, he says it occurs from five to eight feet below the surface, where heating started. My reason would be: I don't see any adequate test which would be six, eight or ten inches below the surface, as to the danger involved.

Q. Is it possible to determine whether or not coal is heated by attempting to smell the coal, to ascertain whether [fol. 608] or not gases are being given off by the coal?

A. It is not.

Q. Give us your reason.

A. When gases are given off which have an odor to them, the temperature is much above the ignition point, it has already reached a temperature which is the burning temperature. Below that temperature, however, there is a dangerous condition, conceded by everyone to be dangerous, at the time of which there is no gas being given off, which has an odor.

Q. Can you determine whether or not there is a hot spot in coal by smelling the coal?

A. Not at all.

Q. What is marsh gas and what relation has it to oxygen?

A. Marsh gas is a gas which has been in the coal at the time of mining. It is a mining condition. The coal is impregnated with carbon and four hydrogens. That is a gas which marsh gas, which the chemists designate as one goes along with the coal—it isn't a product of oxidation—which slowly exudes from the coal. Some coals have more of it than others, and it is dangerous for the reason that in the upper part of a hold or a compartment it might make an explosive mixture with air.

Q. Has it any relation to oxidation?

A. Absolutely no relation to oxidation whatever.

Q. How much of a hot spot is required to make a pile of coal likely to become afire?

A. I would say any size spot. A spot of a cubic foot of coal, if it were heated, would be quite sufficient to endanger the whole mass.

Q. In order to obtain what we call spontaneous combustion how much of the portion of the whole pile of coal needs to be oxidized?

A. It would not need to be but a very small portion.

[fol. 609] The Court: By very small portion what do you mean?

The Witness: A cubic foot or even a hatful, if it got up to the ignition point; larger spots in proportion just as oxygen could get to it.

By Mr. Jones:

Q. Would a small amount of oxygen coming through the bottom of this bulkhead be sufficient to supply the oxygen required?

A. I don't think so. You mean the sill bottom?

Q. Between the bulkhead; you know I have described the bulkhead to you, as the beams rested on the plates and the overlaps of the beams.

Mr. Keating: I object to that. There is no testimony that the plates overlapped the beams.

The Court: I don't recall any such testimony.

Mr. Jones: I asked the mate this question—because I said from my photographs it was so—I asked the mate, and I help up my hands to demonstrate, if the plates in the deck weren't fastened together by one plate resting on another.

The Court: I remember that.

Mr. Jones: And then the beams rested over those plates where the plates came together.

Mr. Keating: No, sir; he didn't.

The Court: My recollection is that he didn't know what the situation was under there one way or the other.

Mr. Keating: He said any good carpenter would fit it that way.

[fol. 610] The Court: I will allow the question.

Mr. Jones: I think I can get from Professor Parr what I want without going that far.

By Mr. Jones:

Q. I leave out the temperature. Assuming that the bulkhead is constructed in the way that the mate has described, that is to say, that the planks running vertically, planed, put together, battens on each side and with separation cloth, separating it from the deck, which is fastened at the top, the separation cloth consisting of two or more pieces of material, which is described to be something like bagging, but a little finer than bagging, something you can see through when you held it up to the daylight, then fastened where the two pieces of material came together with battens nailed into the bulkhead; can you say whether or not a sufficient quantity of air could come through such a bulkhead, so constructed?

The Court: Leave out any possible crevices between the sill and the plates of the floor.

A. In my opinion there would be sufficient opportunity for air to get in to cause spontaneous combustion.

By Mr. Jones:

Q. And would still be of opinion that it would be a dangerous compartment in which to store coal?

A. It was.

Mr. Keating: Your Honor, I move to strike out that tes-
[fol. 611] timony, because that testimony involves an opinion with respect to a bulkhead. The question that Mr. Jones directed to this witness, which the witness answered, was whether a small quantity of air getting through the bulkhead would cause a hot spot, and the witness answered No.

The Court: The witness was asked whether air might go through the sill plates in the bottom. To that he said no.

Mr. Keating: As I understand the question, it was whether a small amount of air getting into the mass of the coal would cause a hot spot.

The Court: I deny your motion to strike it out.

By Mr. Jones:

Q. Would a small continuous current of air getting into the coal cause a hot spot?

A. It would.

Q. Professor Parr, as I understand what has been testified by the ship's people, that old coal was lying around the sides and ends of this compartment on an incline, the top of the incline being about three feet from the top of the bulkhead and the sides, and the bottom of the incline about two feet from the square of the hatch, all around; then when they came to put the new coal in, that new coal was dumped in the hatchway space and was thrown in around the space so formed by the incline of the coal and until the compartment was filled with coal, with the 160 tons of coal that was in the compartment when they first began their operation to put the new coal in, plus the coal which they [fol. 612] put in, reached about 350 tons, as I remember, would you say that was a prudent thing to load the coal that way?

A. I would say it wasn't.

Q. Would you say that was a dangerous condition?

A. I would.

Mr. Jones: That is all.

Cross-examination.

By Mr. Keating:

Mr. Jones: If your Honor please, in order to save a little time, I have three other experts here and they have all heard this hypothetical question which I have put to Mr. Parr and I do not think it will be necessary for me to later repeat it.

By Mr. Keating:

Q. Professor Parr, you have referred to page 6, figure 6, of Exhibit 28, to a coal pile which you say illustrates what you had in mind about through ventilation; is that correct?

A. Yes, sir.

Q. Now, do you claim that the coal pile on the "Galileo" looked like that?

A. I didn't. It had the corresponding conditions, however; it wasn't in that shape.

Q. Have you taken into consideration the fact that the coal was trimmed when it was put into that compartment?

A. Certainly.

Q. Professor Parr, assume that this hot spot that caused this fire was at a point about 17 or 18 feet aft of the wooden bulkhead that has been described, and that that hot spot was about 17 or 18 feet aft of the wooden bulkhead we have been talking about and described to you by Mr. Jones, and [fol. 613] along the starboard side; in your opinion, would a small, infinitesimal amount of air getting through the wooden bulkhead forward cause that hot spot?

A. That depends on what you mean an infinitesimal amount of air. Whatever air got in, if the coal was segregated and channeled, it would not make any difference whether it was five feet or fifteen feet.

Q. If somebody built a channel it would be fine?

A. Well, coal channels itself automatically, certainly.

Q. Would you say with an assorted mass of coal, which had been in that ship in that position since June 30th, that a small amount of air getting through the bulkhead could push itself 17 or 16 feet through that mass of coal to the point where the fire was discovered?

A. It would be entirely possible.

Q. Would you consider it probable?

A. I would consider the method of filling a ship. We know the lumps predominate over the fine stuff. That would be practical for the air to travel through the coal.

Q. Professor Parr, if the hot spot was at the after end of this pile, the old coal near the bottom of the slanting pile, which it would have to be from the description, the air could have gotten to that spot even through the bulkhead?

A. I don't know; I do not know the construction that you have reference to. If there were openings anywhere near that spot, the air probably would have traveled the shortest route.

Q. Now, the hatches were off while the vessel was in port, they were taking out grain,—that, apparently, at the time there was a condition existing from August 17th, when the vessel got here, until August 26th, when the coal was loaded—in other words, wasn't there an opening right

[fol. 614] up to the sunlight and air? Might the air have come from that place?

A. On the surface, yes, but not in the interior of the coal.

Q. If a coal pile is piled up in the outside—in the great outdoors, so to speak—the outside air gets in under the coal pile, doesn't it?

A. It does. It may——

Q. Now, if this coal was piled up in the bunker with air in there—the testimony shows that they opened the lower hold and put grain down in there, and that hatches were off while in port—there would be some air in the No. 3 tween deck, would there not?

A. Yes.

Q. If you find the hot spot, so to speak, not against the bulkhead but 18 or 19 feet forward, in a spot which is practically the end of the pile, so to speak, of old coal, wouldn't you naturally look for the air to have entered the pile at that spot?

A. That would depend upon conditions. Air——

Q. It is conceivable that that might have happened?

Mr. Jones: Let him answer the question.

A. Air under those conditions would be considered as not likely to cause spontaneous heating ordinarily. Now, if you can establish conditions whereby that air would circle down through the coal, it would be just as likely to cause a hot spot as any other air, but it must get down in the mass of the coal to start spontaneous combustion.

Q. Will you look at this figure, Exhibit 28, page 6, and tell me where in that figure fire would likely start.

A. Assuming that the dark portions are the finer por-
[fol. 615] tions and that the distance from this surface were four to five feet in from the surface, I would say that in this lower mass would be the point where spontaneous combustion would start.

Mr. Jones: You have drawn a line with a pencil and marked "A".

By Mr. Keating:

Q. You mean in this mass in here, inside that?

A. In the darker portion of the coal.

Q. Below the line or above the line?

A. Above the line where that pencil mark is.

Q. Suppose you put your pencil point exactly where you think the fire would start.

A. Well, in this zone here.

Mr. Keating: I will mark that "A".

Q. Now, where would the air enter that coal pile?

A. It would come in along the segregated portion of the coal, which is coarse enough to admit of the air passing through.

Mr. Keating: Shall we mark that with an arrow?

The Witness: All right.

By Mr. Keating:

Q. Might it come from the other side, too?

A. It might.

Q. Now, Professor Parr, I am going to draw a line through the center of that picture.

Mr. Jones: Give him Exhibit 28. We ought to mark the actual exhibit.

[fol. 616] Q. Is that about right?

A. It is.

Q. Now, I am going to draw a line there; I will call that line B-C, and I am going to ask you to assume that this is either an airtight bulkhead or a substantially air-tight bulkhead, and that this slanting line B-D is the form of the coal pile, the finds and the larger pieces and the largest pieces being in the form shown in that photograph on page 6, Exhibit 28, and I ask you to tell me in that situation where the air would come from which would start any fire in that coal pile.

A. You are asking me to assume that this perpendicular is air-tight. No air can circulate through it. If fire starts in that mass it would have to come from the segregated portion of the pile and run through the fine material above.

Mr. Keating: We will mark that, the direction of the air, with the arrow which is E.

Q. Is that correct, Professor Parr?

A. Yes.

The Court: Is that a fair representation of the old coal in No. 3 tween deck or not?

Mr. Keating: I am not saying that.

The Court: How is it relevant?

Mr. Keating: It is relevant in this way: a pile in that particular shape, the Professor has assumed that because some air could get through this point where I have marked C, that that therefore was the place where it came from later. The coal in question was piled in that general form.

The Court: The coal pile in the form in the bunker was made this way and trimmed off in here.

[fol. 617] Mr. Keating: But we are only talking about the old coal.

The Court: I am talking about the old coal too. The old coal was put in by piling it in the center of the hatch and it came down. This apex ought to be over here, if that is the bulkhead, and then fall off in this direction.

Mr. Keating: That is quite an error.

The Court: Correct me.

(Extended discussion off the record.)

The Witness: I would like to protect my own answer in which the condition of accessibility of air to the bunker only was mentioned. I would not agree that this is a possible arrangement of the coal. I would pass on that but I would like to make it evident that I am not admitting that form of piling of the coal.

Redirect examination.

By Mr. Jones:

Q. Professor Pare, I show you Exhibit 14 and a drawing which appears on the last page of that exhibit, showing deck distorted in this area, and I direct your attention — what is described as a wood bulkhead on that exhibit and call your attention to the fact that that wood bulkhead is a wood bulkhead in the forward part of No. 3 tween deck, and No. 3 tween deck is marked No. 3 hatch, and I also direct your attention to a portion of the exhibit which reads as follows:

"It was evidence that the fire had been in the lower tween deck and quite local in extent inasmuch as the distorted

parts are confined to the limited area described above and [fol. 618] indicated on the enclosed sketches. The hottest part of the fire has been from the after end of No. 2 hatch to the wooden bulkhead between No. 2 and No. 3 hatches in a fore-and-aft direction and from about five feet to starboard of the center line to about twenty feet to port of the center line in a thwartship direction."

And this is the area indicated in the sketch, and I ask you whether or not with that before you you are in a position to say that fire started within the area as shown on that sketch.

The Court: Before you answer, I would like to have Mr. Keating hear the question.

(Question read by the reporter.)

Mr. Keating: I object to that.
The Court: I will sustain the objection with an exception.

By Mr. Jones:

Q. You were asked a number of questions by Mr. Keating with respect to figure 6, which appears on page 6 of Exhibit 28, and I believe you stated in reply to some question that had been put to you that that wasn't your conception of the pile of coal in the No. 3 tween deck in the "Galileo". Am I correct in so saying?

A. I should say it isn't a possible method of arranging itself in the matter of fine and coarse material.

Q. Will you explain what other possible methods there are of arranging fine and coarse material?

A. It would be more a reverse of this condition, if one [fol. 619] can conceive of it as being turned over on its side and the coarser portion between the incline of the bulkhead and the deck. As you get farther away from the bulkhead the fine material would begin to grow in amount relatively.

Q. In your opinion, would it be dangerous to have coal stowed in a compartment with an air-tight bulkhead as Mr. Keating has described to you?

A. If it were air-tight it would be safe from spontaneous combustion.

Q. Even with the hatches open?

A. Even with the hatches open.

By the Court:

Q. I understood you to say that surface ventilation is not employed at all for the purpose of preventing spontaneous combustion.

A. My understanding is it is not.

Q. In this absorption of oxygen, does the coal pass on the oxygen after it is absorbed? I want to know how the oxygen goes through the coal. A particle of coal exposed to oxygen will absorb some of it. Now, having absorbed it does it continue to hold it or pass it on to the particle of coal adjacent to it?

A. It will pass it on.

Q. The identical molecule of oxygen that it has absorbed?

A. Not necessarily. The oxygen that the coal takes on it holds for a time—that is, I am giving you the best opinion, the authority, and that is my own; the oxygen is first held by absorption only and not by chemical union. As it goes on it enters into chemical combination with the coal, and the products of that oxidation pass off through the coal. Now, the oxygen, when it is taken up by the coal, is localized. That particular particle of oxygen stays where [fol. 620] it is taken up, but more can come in and more can be taken on, almost indefinitely.

Q. Then oxygen reaching the interior of a coal pile reaches it only by convexion?

A. By convexion only.

Q. Now, in the case of this compartment, wouldn't the coal near a crevice absorb such oxygen as came in contact with it and bar the way to the interior coal, the coal further in the interior of the pile, getting oxygen from the same crevice?

A. I would hardly think it absorbs with sufficient rapidity to rob the air of oxygen as it passes through. That would depend on the amount of the air. If it stayed in contact with the coal long enough there might not be any oxygen left for further in, but that would be an almost impossible situation.

Q. Now, the avidity that you mentioned has very little effect on creating convexion, doesn't it, in creating a current of air?

A. I would say it would be very small in creating a current.

Q. Practically negligible?

A. If the action of avidity is just in proportion as it has taken oxygen out of the air, it is in that proportion a vacuum and calls for more air.

Q. But in the case of this compartment, that avidity, whether it is considered in the first stage of merely absorbing, or the latter stage of chemical reaction, would have very little effect in drawing air through the crevices?

A. It would be very small.

Q. So that the amount of air that would go through those crevices would depend much more upon the variations in pressure between the atmosphere in No. 3 and in No. 2, wouldn't it?

A. I think so. I would agree to that.

[fol. 621] Q. And with the use of the ventilators the pressure would be practically the same, wouldn't it?

A. Well, I assume that ventilation operating in compartment 3 would tend to reduce the pressure in the compartment as against that side of the bulkhead on the forward part, on the forward side. The compartment forward of the bulkhead would have the normal pressure of air; if the ventilators had any pull at all, the flow would be there forward into No. 3, wherever there was——

Q. Well, the ventilators in No. 3 are there for the purpose of relieving the pressure in No. 3, to take off this marsh gas?

A. They would have to reduce pressure as well in order to get fresh air to move in place of the air drawn off.

Q. If there were ventilators in No. 2 and 3, the pressure would be practically the same?

A. I think so. It would be very difficult to conceive of a set of conditions where there was an exact equilibrium of pressure of air.

Q. In so far as you know, the pressure in No. 3 might have been greater than in No. 2?

A. Yes.

Q. In which case the air from the crevices would tend to pass in the opposite direction?

A. In the opposite direction, yes.

Q. So that, practically speaking, the only force tending to draw air through those crevices would be a variation in pressure between the two compartments?

A. That would be the main factor involved. I think the factor of absorption and the tendency to create a vacuum should not be lost sight of, however.

Q. That is probably more than offset by the tendency to liberate marsh gas?

A. Not at all. The marsh gas isn't a factor sufficient in amount to enter into the matter of pressure.

[fol. 622] Q. Can you give me any figures on the comparative amount of marsh gas liberated and of oxygen absorbed by coal in volume?

A. Coal will absorb approximately from one and a half to two times its volume, that is to say, a cubic foot of coal in contact with air will absorb oxygen from about two cubic feet of air. That would be altogether without any conceivable relation with marsh gas.

Q. Taking it from the time the coal is first mined.

A. I would say within ten days that this avidity is most active. If I were to assume the amount of air necessary to bring the coal up to a dangerous temperature it would take two cubic feet of air to one cubic foot of air.

Q. What percentage of oxygen is there in the air?

A. Twenty per cent.

Q. So it wouldn't be really two cubic feet. It would be absorbing about two-fifths?

A. Two-fifths.

Q. Of its own volume of oxygen, covering that period when the avidity is so very great, the first ten days, and therefore it would be very much less, depending upon how long the coal had been mined. Say it had been mined six months, it might for a period of a few weeks absorb very little, might it not?

A. The relation would be about one month, would absorb about one day in the active part of the stage. In general, that is to be the ratio. Now, marsh gas: I would think that where we would be speaking of cubic feet of air, the marsh gas would not be any more than in cubic inches. If we talk about two cubic feet of air I think two cubic inches of marsh gas would be more nearly the ratio of the marsh gas, so I don't see how the marsh gas would cut any figure in the ventilation or displacement of gasses.

[fol. 623] By Mr. Jones:

Q. What period of time does coal give off marsh gas?

A. I couldn't imagine it would be giving off marsh gas more than two or three days.

Q. After what time? When it comes out of the mine or what time?

A. I was speaking in terms of after the coal is received, but it would be quite applicable to the time from mining, but coals vary in quantity of marsh gas which they hold.

Q. But you said you couldn't conceive of coal giving off marsh gas after two or three days, after it is received.

The Court: It is only this marsh gas that this surface ventilation is for?

The Witness: That is right.

By Mr. Jones:

Q. And as I understand your testimony, your position is the accessibility of air is a more important point rather than that current of air?

A. It is.

Recross-examination.

By Mr. Keating:

Q. Professor Parr, if coal doesn't give off any gas, dangerous gases, after the first few days——

A. Marsh gas.

Q. —marsh gas, why do you have to have surface ventilation? Are there other gases?

A. In the coal?

Q. Yes.

A. No.

Q. What is the purpose of having surface ventilation if the coal doesn't give off any gases after two or three days [fol. 624] after it is mined?

A. I think it would be to guard against danger.

Q. You are not in favor of surface ventilation?

A. Surface ventilation? Yes, against explosion.

Q. What explosions could there be if there are no gases?

A. None.

Q. What are you guarding against?

A. Against the possibility of gas being exuded in the space of time.

Q. Now, Professor Parr, you have told me that the purpose of surface ventilation was to get rid of gases that the coal exuded. Am I right?

A. Correct.

Q. And you said there must be surface ventilation of coal to get rid of those gases and that was the only purpose of surface ventilation: am I right?

A. Well, I assume that that is the main purpose. Whether that is the only purpose I don't know.

Q. Didn't you tell his Honor that the only purpose of surface ventilation was to get rid of the dangerous gases?

A. Very well.

Q. Didn't you say that?

A. I am not sure of whether he stipulated that that was the only reason. It is the main reason and you can qualify that point.

Q. Professor Parr, didn't you tell his Honor not later than this morning that the only purpose of surface ventilation was to get rid of dangerous gases, and that dangerous gases had nothing to do with spontaneous combustion?

A. I——

Q. Did you or did you not so testify this morning?

A. I would have to have that read.

Q. You can't recall?

A. I am not sure unless I hear my answer to it. No, sir. I should say it is the only reason for surface ventilation. [fol. 625] Suppose you must send a man into that place. Would the ventilation for marsh gas suit the need and conditions of the man working there? I would say it is absurd.

Q. Professor Parr, do I understand that you have testified that after the first few days there are no dangerous gases to be taken care of by surface ventilation?

A. I didn't say that there are not some gases, no explosive gases to be taken care of by surface ventilation.

Q. I ask you the flat question, Mr. Parr: if coal gets rid of all those dangerous gases during the first few days——

A. Carbon dioxide is a dangerous gas.

Q. That is marsh gas?

A. No, carbon dioxide is the product of combustion. Marsh gas isn't the product of combustion.

By the Court:

Q. Well, does coal liberate carbon dioxide from the start?

A. Oh, no; over 46 weeks.

Q. In what quantities does it liberate carbon dioxide?

A. It liberates carbon dioxide, as I recall the figures, to the extent of about 7 per cent of the weight of the coal, in the course of that number of weeks.

Q. Well, that would be more than the volume of oxygen absorbed, wouldn't it?

A. It is directly the result of oxygen absorbed. The oxygen absorbed may be sufficient in amount to increase the weight of the coal to that extent and the carbon dioxide, that is a product of that oxidation, rises to the surface.

Q. So that the atmospheric pressure in that chamber or the pressure in the closed, sealed chamber, would be main-
[fol. 626] tained about equal, though there was absorption of oxygen, would it?

A. Well, that would be the tendency, to equalize the robbing of the atmospheric oxygen.

Q. In those sealed jars that you mentioned, do you find that there is a partial vacuum after the absorption has continued for a day?

A. To the extent of the removal of the oxygen.

Q. A partial vacuum?

A. Yes.

Q. How about the carbon dioxide that has been liberated?

A. The production of carbon dioxide in that stage of activity is not very great. It comes in as an action later on.

Q. So that if you were testing out the pressure in your containers on about the thirtieth day you let in a fresh supply of air and permit the absorption of oxygen to go on for 24 hours and then test for your pressure; at the end of 24 hours you would find it was about atmospheric pressure, wouldn't you?

A. It would be more nearly atmospheric pressure than during the great avidity.

Q. Because the carbon dioxide would have been liberated in about the same amount that the oxygen was absorbed?

A. Yes.

Q. And that, of course, applied to coal in No. 3?

A. I think it would.

By Mr. Jones:

Q. When coal gets warm, even to a degree or so, can you state whether or not a current of air is formed that would create a chimney effect from the crevices in the bulkhead through the mass of coal?

Mr. Keating: I object to that as a leading question.

[fol. 627] Mr. Jones: I will modify it.

Mr. Keating: You have already told the witness.

By Mr. Jones:

Q. Professor Parr, when coal is heated even to a degree or so, what effect has that, if any, on the effect of air through the coal?

A. It distributes the equilibrium and the warmer gases rise and the cooler gases take their place.

Q. What is the relation between the weight of marsh gas and the weight of air?

Mr. Keating: I object to that as not proper re-direct examination.

The Court: It has nothing whatever to do with the pressure.

Mr. Jones: Marsh gas rises, if your Honor please.

The Court: I think everybody knows that. However, put it on the record if you desire.

(Pending question read by the reporter.)

A. About one-fourth.

Q. Which is the heavier?

A. The air.

Horace C. Porter, recalled as a witness on behalf of the libellant, testified as follows:

Direct examination.

By Mr. Jones:

Q. Professor Porter, have you made experiments to determine over what period of time coal shows an avidity for oxygen?

A. Yes, I have.

[fol. 628] Q. Will you tell us what the results of your experiments are?

Mr. Keating: I object to it as not proper rebuttal. The matter has been thoroughly gone into on Mr. Jones's direct case.

Mr. Jones: I bring out this testimony in view of what your Honor said during the trial. I thought your Honor had agreed——

The Court: Will he corroborate Professor Parr?

Mr. Jones: Yes.

The Court: I do not think that there is any question but that the avidity is very great for the first six or seven days.

Mr. Jones: It continues over a period of 46 weeks at an even rate.

A. My experiments showed that the avidity of coal during the first two or three days for oxygen was greater than during the succeeding period, but the absorption of oxygen continued then for a very long period without any great decrease. After ten months, in my experiments, it was still absorbed very rapidly, not as rapidly as the first days, however.

Q. Do you mean decrease in rate?

A. Not a great decrease—a slight decrease.

By the Court:

Q. Do you agree with Dr. Parr that that is about one-thirtieth?

A. No, your Honor, I don't agree to as great a difference as that. There would be some difference, but not quite as great as one-thirtieth.

[fol. 629] By Mr. Jones:

Q. Now, you heard the hypothetical question which I put to Professor Parr with respect to this compartment and the piling of the coal around the compartment and the construction of the bulkhead, described in that question: Are you in a position, with the facts so stated, to say whether or not in your opinion the compartment was a safe compartment for the storage of coal?

A. Yes, I am in a position.

Q. State whether or not it is a safe compartment for the storage of coal.

Mr. Keating: I object to it as not competent; not proper rebuttal.

The Court: Overruled with an exception.

A. I still believe it wasn't a safe compartment for the storage of coal.

By Mr. Jones:

Q. Please state your reasons for so saying.

Mr. Keating: I object. I am entitled to know his reasons, not Mr. Jones. He cannot cross examine this witness.

Mr. Jones: I am clearly entitled to ask the witness to state——

The Court: I will take it and give you an exception.

Mr. Keating: He is not entitled to give the details and processes upon which he forms his opinion.

The Court: I will take it anyway and give you an exception.

[fol. 630] A. My understanding of your sketches as they were drawn, during Professor Parr's testimony, the loading of this compartment with coal would cause the lumps and coarser parts of the coal to collect at the base of the pile, near the bulkhead.

The Court: He has told me all that. I know what he said. Do not let us repeat it.

Mr. Keating: I move to strike it out.

Mr. Jones: If your Honor please, of course Mr. Porter has testified to this, but we have had, since the direct case, a great deal of additional evidence as to the structure of this bulkhead and all I want to do——

The Court: But he is coming down to fundamentals again. I will permit you to direct his attention to the specific things, such as battens, and so forth, that weren't in evidence at the time, but we don't want to go all over what he said before.

By Mr. Jones:

Q. Professor Porter, I direct your attention to the fact that this mate has testified that this bulkhead was con-

structed of planks three inches in thickness, ten inches in width; the edges of the planks were planed, and that they were fitted vertically in slots, slots being formed of pieces of wood, as shown on Exhibit 21, and I ask you, keeping in mind the bulkhead so constructed, whether you still think you are in a position to say that compartment, after the bulkhead, was a safe compartment to stow coal; also keeping in mind that they had a separation cover which was [fol. 631] over the battens, over the bulkhead, which is fastened to the bulkhead by a batten which ran along the top of the separation cover, being about the size of an ordinary hatch cover,—two were necessary to cover the entire bulkhead,—and a batten was nailed to hold the two pieces of separation cover together on to the bulkhead.

Mr. Keating: Now, if your Honor please, I object to that question. This man is a chemical engineer. He is asked to give his opinion with regard to a portion of ship construction which involves knowledge of ship ventilation, hold pressures, and a number of features that this man cannot possibly know anything about. I can get a man over in City Hall Park who knows more about this thing than this man.

The Court: Just having in mind the matter of spontaneous combustion.

A. I would answer that by saying I have had experience in the examination of coal piles and have had charge of entire coal piles, and I believe that would qualify me to answer the question.

Mr. Keating: I move to strike out that answer.

The Court: Strike out the answer.

A. The ventilation, I believe, in this case through the under part of the coal, under the bulkhead and through crevices would be sufficient to cause heat.

[fol. 632] Mr. Keating: I move to strike out the answer. There is no evidence that there were holes or crevices in the bottom of the bulkhead, nor was the witness asked to assume——

The Court: You weren't asked to assume there were any holes or crevices in the bulkhead. Leaving that out and

considering solely the crevices between the planks and the battens——

The Witness: It doesn't make any difference whether they were under the bulkhead or between the planks, as long as the air came through.

By Mr. Jones:

Q. What I am asking you is: are you in a position on the facts which I stated to you to state whether or not the compartment was a safe compartment for the stowage of coal?

A. In my opinion——

Q. Yes or no.

A. Yes.

Q. Then state your opinion.

Mr. Keating: I object.

The Court: I overrule your objection and give you an exception.

A. In my opinion it wasn't a safe place.

By Mr. Jones:

Q. Assume that at New York before the fresh supply of coal was placed in this compartment, the chief engineer put his hand in up to his wrist and felt the coal with his hand [fol. 633] and was unable to detect any decided degree of temperature from so feeling: would you be of opinion that the compartment was still unsafe for the purpose of carrying coal?

A. Yes, I would.

Q. Is it possible to determine the condition of the interior of a pile of coal with respect to temperature, by shoving your hands into the mass of coal up to your wrist, assuming that the coal is about six feet high and tapers off on an incline of about fourteen feet?——

A. Not any further down than a man's hand up to his wrist?

Q. Is it possible to determine whether or not coal is heating by endeavoring to smell the coal, to ascertain whether or not gases are being given off by the coal?

A. Not in all cases. It is possible to determine whether the coal is reaching the degree of heat where it will give off gas, that is all.

Q. Can you determine whether or not there is a hot spot in coal by smelling the coal?

A. No.

Q. How large a hot spot is required to——

Mr. Keating: I object to this testimony as not proper rebuttal.

The Court: Overruled.

A. A spot as large as one cubic foot would give rise to spontaneous combustion which would go on to a dangerous condition.

By Mr. Jones:

Q. In order to obtain what we call spontaneous combustion, how large a portion of the whole pile of coal needs to be oxidized?

A. One small spot as large as one cubic foot or even less.

[fol. 634] Q. When coal is piled in the way in which I have described to you—this old coal being piled in this No. 3 compartment—can you say whether or not there is any movement of air through the mass of coal?

A. Yes, I can.

Q. Well, was there any movement of air through the mass of the coal?

A. Yes, there is.

Q. Please describe to us what movement there is.

A. The coal becomes slightly warm and warms the air around it and that warm air rises. It is a well known principle in all ventilation engineering that warm air rises, that a warm spot in the coal causes a current of warm air to rise from it even though it is a degree or two above the surrounding air. That is what is known as a chimney effect. Other air is naturally drawn into that warm spot to take its place. It doesn't make any difference whether it comes from one side or the other. It will come along the line of least resistance; wherever it can get the air easiest it will draw it in. Naturally, there would be more or less of a seepage or penetration of air wherever there is a warm spot, even slightly warm.

Q. In your opinion is it dangerous to admit air through the square of a hatch, in the upper portion of a coal bunker?

Is there any danger in admitting air to the coal through the square of the hatch?

A. Not very much, no.

Q. Would you consider admitting air in that way unsafe?

A. No.

Mr. Keating: No cross examination.

(Witness excused.)

[fol. 680] ALBERT E. JORDAN, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Mr. Jordan, you are a marine engineer?

A. Yes, sir.

Q. Will you give us a brief account of your experience?

A. I served an apprenticeship of five years. I was at sea for eight years, of which five years I was chief engineer, two years assistant manager in a dry dock in the north of England. I was fourteen years surveyor for the Salvage Association of London, 12 years of which was in America; that brought me up to 1939. From then to the present time I have been in business for myself as a consulting engineer.

Q. You represent a number of large steamship companies as engineer?

A. I represent probably 200 steamers. I am also vice-president of a steamship company.

Q. Mr. Jordan, you were one of the surveyors who signed Exhibit 14, were you not?

A. Yes, sir.

Q. Now, Mr. Jordan, from your examination of the "Galilee" on August 12th, 1937, are you in a position to say whether or not the fire which occurred on this vessel could possibly have originated as far back as 92 feet aft of the wooden bulkhead in tween deck No. 3?

A. Yes, sir.

Q. In your opinion could the fire have originated as far back as 14 feet aft the bulkhead in tween deck No. 3?

A. No, sir; I don't think so.

Q. Describe in detail what you found and the reasons for your statement.

[fol. 636] A. The fire in this space was in the immediate vicinity of the bulkhead, and there was greater damage on the deck above the lower tween deck space towards No. 2 hatch than there was towards No. 3 hatch.

Q. Have you indicated on a drawing the position where you found the damage?

A. Yes, sir.

Q. And that is described how?

A. By an oval line with dotted lines on both sides of the wooden bulkhead.

Q. With the wording "Deck distorted in this area"?

A. It was written on that "Deck distorted in this area".

The Court: Had there been any combustion on the shelter deck level?

The Witness: No, the fire was below the shelter deck and the damage was to the shelter deck.

The Court: Was there any combustion at all on the shelter deck level itself?

The Witness: No, sir; no signs of combustion on the shelter deck that could be seen at that time, which was a year after the accident, approximately a year after the accident.

By Mr. Jones:

Q. In your opinion would it have been possible for any fire to have started in the coal 14 feet abaft the bulkhead and not shown some evidence of that fire in the ship's structure?

A. No, sir; I don't think so.

Q. Can you say whether or not a wooden bulkhead can be made air-tight, Mr. Jordan?

A. Yes, sir.

Q. Can it be made air-tight?

A. Yes, sir.

[fol. 637] Q. If you say that a wooden bulkhead can be made air-tight, will you describe in detail how such a wooden bulkhead can be made air-tight?

A. The question of whether it can be is a question of fitting it. If the sills and the foundation of the bulkhead are

carefully fitted to the bunker deck platings and bedded down and properly bolted, that part can be made tight—water-tight or air-tight. The same kind of construction carried out on the sides with the frames of the ship and on the tops of the boilers of the ship, all being made of wood, the planks, whether placed vertically or horizontally,—makes no difference as to the tightness,—should have a joining between the ground and the planks themselves. The planks can then be covered with either tar paper or heavy building paper, and the seams have battens nailed over the paper, or a double buklhead can be made.

Q. Did you find any evidence in examining this ship of any bolts being used in fastening these sills over to the sides or deck of the ship?

A. No, sir. I might say I didn't particularly look for them.

Q. Now, the photograph here would show. Indicate to us on the photograph the position where the bolts would be if bolts were used.

A. The bolts would be here (indicating), but there is a great deal of debris on the deck.

The Court: Are you in a position to say whether or not there were bolts?

The Witness: I am not.

By Mr. Jones:

Q. Are there any evidences of bolts on the side of the ship here?

[fol. 638] Mr. Keating: I object to that.

Mr. Jones: The photograph speaks for itself.

By Mr. Jones:

Q. Is the cost of building such a bulkhead as you described as air-tight large or small? Is it an expensive proposition or can it be done at——

A. It would cost more than a non-air-tight, but the cost would not be very great.

By the Court:

Q. Have you ever seen such a bulkhead?

A. Yes, sir. They have built bulkheads double planked,

and I know a number of cases where they put paper on them.

Q. Is it rare or common?

A. It is common to put paper on them. In my experience I have never seen them very careful about the sills—it is an unusual thing to build in 'tween decks. There are a number of ships with bulkheads in the lower holds and the conditions are entirely different there. There is a wooden ceiling in each lower hold and the sills are fastened to the ceiling.

By Mr. Jones:

Q. Is it common practice to have a permanent bulkhead or a bunker space constructed of wood?

A. Is it a common practice?

Q. Yes.

A. It is a common practice.

Q. To have permanent wooden bulkheads?

A. It is a common practice to put wooden bulkheads in lower holds. It isn't a common practice to put wooden [fol. 639] bulkheads in hold 'tween decks, and it isn't a practice at all to fit bunkers up with wooden bulkheads.

By the Court:

Q. Never done?

A. Not with permanent bunkers.

Q. How about the temporary bunker?

A. They are made with a temporary wood bulkhead.

Q. It is quite common to have temporary bunkers in a vessel?

A. Yes, sir.

Q. And in those cases they are invariably made with wooden bulkheads?

A. Yes, sir.

By Mr. Jones:

Q. Can you say whether or not a steel bulkhead or side wall of an ordinary bunker is air-tight or reasonably air-tight?

A. The outer wall of a bunker is air-tight. In all such bunkers the ends are usually water-tight. They form as a rule a part of the structure of the ship. Sometimes they

don't. The inner wall of a side bunker is not made water-tight.

Q. Can you say whether or not it is reasonably air-tight?

A. It is reasonably air-tight in its construction. There is always a door, which is not an air-tight door.

Q. It has been suggested that air can get into the body of coal which is in a bunker through the small opening varying from one-sixteenth to one-eighth of an inch around the deck beams. In your opinion would it be possible for air to get into the body of coal through such opening?

A. No, sir. The area around the deck beam is around the [fol. 640] top. The air gets over the top of the coal, then travels along the hatch and gets into the coal which may be in the square of the hatches, but the air enters under the deck over the coal in that space.

By the Court:

Q. If the number of alleged openings were filled it could get into the body of the coal very easily?

A. No, sir. Can I show you?

Q. That is assuming that the hatch is open.

A. Supposing "A" is the ship's side, the vertical line, the beams go across ship marked "B", this lower beam is usually stupped and the boilers are here. This vertical line "C" is the side of the bunker. Now, these beams going across the ship are made coal tight so the coal doesn't fall out, by putting collars around them. On top of those beams are deck plates. The hatch is about the center of this space—the hatch is an opening in those deck plates.

Q. Indicate the hatchway.

A. Marked hatch. The air getting in here gets under this deck. Assuming this place is full of coal, the air can get in that way and into the body of the coal. It doesn't get into the body of the coal here close to it.

Mr. Jones: I offer the sketch in evidence.

(Marked Libellant's Exhibit 30 in evidence.)

Q. In your opinion, Mr. Jordan, the amount of air coming into the coal through the opening, which you have indicated along the beam, caused no damage to the coal in the bunkers?

[fol. 641] Mr. Keating: I object to that. This man has not been qualified to measure it.

Mr. Jones: He is a ship construction man and he knows ship construction.

The Court: I will take it and give you an exception.

A. The collars formed around your beams are——

Mr. Keating: I object to it as not responsive.

The Witness: I don't think so, sir. I mean, if I may qualify that. I have been at sea for quite a long time with that construction of a side bunker and there has not been any damages seen in those bunkers.

By the Court:

Q. Is it because that amount of air couldn't cause any damage or that the air wasn't located in the place to cause danger?

A. I would say the latter is correct, your Honor.

Q. You think that amount of air would be dangerous?

A. That depends entirely on how large an opening you have.

Q. I mean one-sixteenth of an inch around the beams.

A. You have quite a number of them, two feet apart. That amount of air would be quite sufficient to be dangerous.

Q. Assuming that the upper and lower bunkers are both filled, why couldn't that air get into the interior of the coal as easily as if there were no floor to the upper bunker?

A. The side bunkers of the ship are as a rule worked out [fol. 642] first. They remain closed and there is not any current of air going through them at all. They are much smaller than the hold of the ship and they are at the side of the bulkhead.

Q. It would be very hot there, wouldn't it?

A. It is very hot. They have two small hatches there, as a rule, in them, and the boilers occupy the sides in the lower 'tween decks in most of the ships, and as I made on that sheet, that deck doesn't come through. It is either open altogether—it doesn't take very long for that coal to be used up—or it is closed altogether and there wouldn't be a current of air drawn through if it was closed altogether.

Q. Now, Mr. Jordan, you heard the hypothetical question that I put, describing the bulkhead. Are you in a position to say whether the space abaft that bulkhead was safe to carry coal?

A. Yes, sir.

Q. In your opinion it was?

A. Yes, sir.

Q. In your opinion it was safe?

A. No.

Q. Are you familiar with the arrangement of ventilators on ships?

A. Yes, sir.

The Court: What is the use of taking time with that, in view of Professor Parr's statement that it had nothing whatever to do with spontaneous combustion?

Mr. Jones: I simply want to show from Professor Jordan a fact that is apparent, that the recommendation of the Board of Trade wasn't applied——

The Court: According to this witness, it had nothing to do with it. Why not relieve the case of the issue entirely and accept Professor Parr's statement?

Mr. Jones: I would like to have this point covered, if [fol. 643] your Honor doesn't mind.

Mr. Keating: I object to this testimony.

The Court: I will give you an exception.

By Mr. Jones:

Q. (Last question read by the reporter.) Can you answer? How are compartments customarily ventilated?

Mr. Keating: I object, your Honor, further that the Board of Trade rules are in evidence, introduced by Mr. Jones and, by the very terms of them, they didn't apply retroactively. I ask the Court to look at them and satisfy himself and if this witness testified that we didn't meet a regulation of the British Government that doesn't apply to us, it is a further objection.

A. The usual ventilation of the hold of a ship, which includes the 'tween decks and shelter deck spaces, is to have ventilators at the forward and after ends.

By Mr. Jones:

Q. Now, assuming, Mr. Jordan, that the ventilation in 'tween deck space No. 3 was such as shown on Exhibit No.

11, where the word "ventilation" is written on that exhibit, can you tell us what effect that ventilation would have on the compartment with respect to holding air out of the compartment?

A. The placing of this wooden bulkhead between the ventilators on the forward end of No. 2 and the ventilators at [fol. 644] the after end of No. 2 have nullified the effect of having ventilators at the both ends of your space.

Q. How are the ventilators fixed with respect to the deck beams?

A. The ventilators come in between the deck beams, passed through the deck between the deck beams.

Q. With the ventilators fixed as indicated in that sketch, what current of air, if any, would be set up in that compartment?

Mr. Keating: I object.

The Court: Overruled, with an exception.

By Mr. Jones:

Q. (Question repeated by reporter.)

A. Those ventilators would take the surface air out of the hold.

Q. Have any other effect?

A. If those ventilators were placed on the wind they would blow air into the hold if the ship were moving.

Q. What is the purpose of having ventilators in the forward and after end of the hold?

A. So that you can trim your ventilators on the wind, backwards, and get a free flow of ventilation through the entire length of your hold between ventilators.

Q. With the ventilators situated such as these ventilators were, would you get a free flow of air throughout the hold?

A. No, sir.

Q. Now, I call your attention to Exhibit 17, paragraph 5, and I ask you whether or not you would interpret that paragraph——

Mr. Keating: I object.

The Court: Of course, it is incompetent.

[fol. 645] Mr. Jones: My friend asked Mr. Brakenbury how he interpreted——

Mr. Keating: But you didn't object, Mr. Jones, and that is why it went in.

Mr. Jones: I think I did object and it was overruled.

The Court: I don't see how I would permit that. I have done many foolish things, I don't want to deny I didn't do that, but I think it was foolish if I did it.

Mr. Keating: The question is absolutely incompetent.

By Mr. Jones:

Q. What does the word "end," used in connection with a ship, mean in marine parlance?

Mr. Keating: I object.

The Court: It is undisputed. Brakenbury and the rest testified "end" meant forward of the aft part.

Mr. Jones: If that is conceded I don't need to ask——

The Court: You say that it is quite common to have temporary bunkers and almost invariably where you have them you have at least one of the bulkheads wooden. Now, you have said that there have been air-tight wooden bulkheads: are they common or uncommon?

With an exception to both sides.

The Witness: I would say it is uncommon.

By the Court:

Q. To have air-tight bulkheads?

[fol. 646] A. That is to say, that is to be so careful to be air-tight. There are a great number of bulkheads made, by pasting or otherwise covering them with paper; that excludes the air from every place, except the careful fitting of the sill over the plating, where the deck plates are leaded. I think it is usual to endeavor to make the main part of the bulkhead air-tight.

Q. Is it uncommon to see bulkheads in temporary bunkers made the way those were made, with battens over the crevices?

A. No, sir; it isn't uncommon but as a rule there is paper put on them.

Q. Is that paper put over or under the battens?

A. It is put both ways.

Q. Thin paper?

A. If it is pasted, and I have seen thin paper pasted over them; the better way is to put a building paper and

nail the battens over the paper, and nail them where the space of the joinings of the planks come.

Q. This paper: is that used to keep the dust out or keep the air out?

A. I think the thought of the people using it is rather to keep the dust away from damaging cargo than it is with the thought of making it absolutely air-tight.

Q. Of course, this separation cloth had no effect whatever in keeping air out?

A. The separation cloth is exactly the same, simply to protect the cargo.

(Witness excused.)

[fol. 647] JOHN L. STANLEY, recalled as a witness on behalf of the libellant, in rebuttal, further testified as follows:

Direct examination.

By Mr. Jones:

Q. Mr. Stanley, can you say whether a wooden bulkhead can be made air-tight?

A. It can be made air-tight.

Q. If you say it can be made air-tight, will you tell us how much can be made air-tight?

A. One way of making the best kind of air-tight bulkhead would be with a double thickness of planking, staggering the seams and a layer of paper or even canvas in between—close canvas—and fasten*ed* them together in a——

Q. Is the bulkhead so constructed costly or reasonably inexpensive?

A. Well, it is less expensive than a bulkhead and it is more expensive than a bulkhead such as has been described on the "Galileo".

Q. Well, would you say it would cost a lot of money, a thousand dollars, five hundred dollars? Can you give us any idea?

A. The difference wouldn't be, in a ship such as the "Galileo", wouldn't be, to speak roughly, $300.

Q. Is it a common practice to have a permanent wooden bulkhead in a bunker space?

A. No.

Q. Can you say whether or not a steel bulkhead or side wall on an ordinary bunker is air-tight or reasonably air-tight?

Mr. Keating: I object to the words "reasonably air-tight", and I object to Mr. Jones asking the witness to give evidence on a subject not definite. That is a matter I think I am entitled to know.

[fol. 648] Q. Air-tight.

A. It would say within a comparatively short space of time, after the bulkhead had been worked it would be air-tight, from the rusting through damp coal put in there, at the seams, where the lapping of the plates were.

Q. It has been suggested that the air can get into the body of the coal through the small opening varying from one-sixteenth to one-eighth of an inch around the deck beams. In your opinion would it be possible for air to get to the coal through such openings?

A. That depends on the kind of coal, and so forth. Undoubtedly each of those compartments or decks are provided with the necessary ventilators for taking off accumulations of gases. If they are properly constructed they would take care of a considerable amount of it. In addition to which, if the coal was being used in the lower bunker it would make an opening through those hatches that would allow any other air to go through. However, if it was leaking through that coal and the coal was of sufficient proportions to allow a current of air to permeate through that coal, if there were channels or lumps, such might be possible, but undoubtedly to a very small extent.

Q. Now, you have heard the hypothetical question which I put to the other witnesses who just preceded you. With the question before you, are you in a position to say whether the compartment on tween decks was safe or unsafe for stowage of coal?

A. In my opinion it was not safe.

Mr. Keating: No cross-examination.

(Witness excused.)

[fol. 649] FLETCHER STARR, recalled as a witness on behalf of the respondent, testified as follows:

Direct examination.

By Mr. Keating:

Mr. Keating: I wish to recall Mr. Starr, your Honor.

Mr. Jones: My friend objected to my recalling witnesses on rebuttal. Quite clearly I have a right to object to surrebuttal, although I have no objection to Mr. Starr going on the stand.

The Court: It depends upon what he is called upon to testify to. It is possible it is proper. What is the relevant matter you want to ask him about?

Mr. Keating: I want to ask him about this coal pile.

The Court: That is apparent.

Mr. Keating: I think there is considerable question about it.

The Court: It may be a confused condition but not as that picture shows.

By Mr. Keating:

Q. Mr. Starr, will you please look at Exhibit 28. I ask you to assume that in June, 1926 a quantity of Morrisdale coal was dumped from the main deck down into No. 3 tween deck, which is the space that has been described to you by both me and Mr. Jones. You have the space in mind?

A. Yes, sir.

Q. Will you draw the space and position of the coal pile when it was put in and as it was trimmed?

Mr. Jones: Now, if your Honor please, I think that is purely hypothetical.

[fol. 650] The Court: Overruled.

Mr. Jones: I will take an exception.

A. Can I explain a trim in my own words rather than make a sketch?

The Court: Yes.

A. In No. 3 tween deck space——

Mr. Jones: If your Honor please, they could have proved how the pile was trimmed. They had all that evidence in

their possession. Now they call somebody to express an opinion—that is all they had called him for. I wish to note that objection at this time. I think it is quite improper.

The Court: He can tell how the coal went in there. Professor Parr has been asked and testified that the big lumps worked against the bulkhead.

Mr. Keating: This coal came down through the hatch and I think it is quite important that your Honor should see exactly what happened when this character of coal is dropped down into a pile in the center of the hatch, what became of the lumps and what became of the finds.

The Court: I will let him testify to that.

By Mr. Keating:

Q. Confine yourself to that, Mr. Starr.

The Court: Certainly you can tell us what would be the [fol. 651] normal condition as to the lumps and finds of that coal after it was dumped down the hatch on to the floor of tween deck No. 3.

The Witness: Can I tell you without putting it on the record? Because you have very apparently a misconception.

Mr. Jones: I object.

Mr. Keating: I ask your Honor to allow this witness to give us an explanation of the coal pile, with its finds and big pieces and the position; assuming it was dumped down, as the testimony shows in this case, what its position would be.

By Mr. Keating:

Q. Assume it was dumped down the hatch on to the floor tween deck No. 3. Now, you can tell us what your conception of that pile would be.

A. My conception was based on actual experience in many cases where I had actually shoveled coal in almost identically the same situation. The procedure is that coal is dumped down through a hatch on to the floor; in this case a central hatch, in the No. 3 tween deck, and it is there taken up in shovels and thrown away from the hatch.

By the Court:

Q. Immediately?

A. Immediately.

Q. Before it forms any cone?
A. It depends entirely on the method of operation.
Q. That is it.
A. It doesn't make any difference because——
Q. We have to assume that it was left to form into a cone.
A. Certainly.
[fol. 652] Q. Now, describe that cone to us.
A. The cone in a general way would take that figure. Now, this is exaggerated to illustrate the point (referring to page 6, Exhibit 28, figure 6).
Q. I realize that is exaggerated. Everyone knows that.
A. We take a form——
Q. But there would be a tendency to take that form?
A. A tendency governed entirely on the type of coal, the percentage of lumps and finds.

By Mr. Keating:

Q. Take Morrisdale coal.
A. Can I take the coal as testified?
Q. Yes, Morrisdale.

The Court: The only testimony we have is with respect to Morrisdale run of the mine coal.

Q. Yes, take run of the mine coal.
A. Morrisdale.

The Court: Do you know that?
The Witness: I am very familiar. It has a relatively small percentage of lumps, and such a picture would be increasingly impossible.

By the Court:

Q. With such lumps as it had had?
A. It would roll down below, but not in the proportion shown here.
Q. We all agreed on that.
A. Now, I assume that a cone of a certain size is developed on a hatch. In actual practice I have never seen a big cone.
[fol. 653] Q. We can assume. We don't want——
A. I am talking about the general practice.

By Mr. [illegible]:

Q. Assume a large one.

A. While the men attack that with shovels, throw it toward the sides, assuming a very large one, the first one or two shovels may well have lumps, nothing but lumps, and then you begin to get into a mixture of lumps and fine coal. As long as the percentage of lumps in that side run of the mine coal is very small you would very soon get to small coal, and you would soon pile up a slanting pile in the corner near the bulkhead and would very rapidly increase with the lads and every shovel of coal from then on, any lumps that struck that slanting side would run down. You would eventually get something—there is your steel bulkhead.

Q. I think you are referring to line B-C?

A. I mean there is the bulkhead. I am assuming to be on the starboard side of the ship a steel bulkhead, and you would eventually get a slanting pile. Assume that is five or six feet high where the lumps had rolled down and had formed something like that appearance, not perfect of course, but any lumps striking a slanting side will roll down and lie on the lumber floor. You not only get that appearance in shoveling your coal against the side, but the appearance of the coal at the side when it is removed on every bunker I have ever seen.

Mr. Hines: If your Honor please, I move to strike out the answer as purely conjecture. They had every opportunity to call their people to tell how it was piled. They haven't [illegible] called them and I ask that this answer be stricken out as purely conjecture.

The Court: I will allow it to stand and give you an exception.

Mr. [illegible]: It doesn't change my opinion in the slightest that this was the situation with the bulkhead running down the center of that pile. It was a confined situation caused by shoveling the coal over against the wall here. It will be more or less confined in it certainly shouldn't be. I will make that finding right now, but I will let the testimony stand to allow the appeal court to determine whether it is right or wrong.

By Mr. Keating:

Q. You have heard Mr. Parr testify this morning as to the hot spot?

A. I heard of an assumed hot spot. You mean the one 18 feet from the bulkhead?

Q. Yes. Do you agree that that hot spot 18 feet from a bulkhead might have been developed from some air that may have seeped through the bulkhead?

Mr. Jones: I object to that. I have Mr. Cary's testimony and I have the evidence of the man who put the ratline down there.

The Court: Of course, by the time the line was put down in the hole, the whole thing may have been very hot. I will allow the question with an exception.

[fol. 655] A. In my opinion it would be absolutely impossible for air not under pressure, in the sense of a blower, in the sense of being blowed by a blower, for air to seep 18 feet.

The Court: Mr. Keating, he told me about this pressure. I don't think you will impress it with repetition.

Mr. Keating: I will withdraw it.

Q. Mr. Starr, there has been testimony offered in rebuttal that a steel bulkhead which is not originally water-tight will rust water-tight.

A. It is impossible.

Q. Will it rust air-tight?

A. It will not.

Q. What happens?

A. Rust, as the ship works, is the very worst enemy of air-tightness and water-tightness.

Q. Did you hear this bulkhead described by Mr. Stanley, this air-tight wood bulkhead?

A. Yes, sir.

Q. Will you state whether or not in your opinion such a bulkhead, as described by him, would remain air-tght?

A. Could not possibly remain air-tight.

The Court: Why?

The Witness: When working the ship, the drying out of the paste, any pieces of cargo against the paper, if the paper is over the battens there will be air channels under

the battens and no means of pasting will make that absolutely air-tight. In service conditions on board ships such a bulkhead could not be considered air-tight. The attempt is made to make it dustproof.

[fol. 656] By Mr. Keating:

Q. Mr. Starr, you heard his Honor ask some questions about the air pressures and the difference in the air pressures between No. 2 and 3 'tween decks. Will you state to his Honor your opinion with respect to which way the pressures would be and how they would be determined?

A. There would be nothing, except a very, very slight pressure differential——

Mr. Jones: Your Honor, this is not proper rebuttal. All I did was to put on my witnesses to rebut what my opponent's men said.

The Court: If the Court wants to take it. I will give you an exception.

A. (Continued.) There would be a very slight difference in pressure, the actual air pressure either above or below atmospheric pressure in those two compartments. That difference would be so slight that in my opinion it would not be considered as forcing air or drawing air to the other side. That pressure might vary every half hour, depending upon the shift of wind or trim of the ventilators.

By Mr. Keating:

Q. Can you tell which way it might be?

A. It might be forward.

Cross-examination.

By Mr. Jones:

Q. I believe you never went to sea except in naval vessels?

A. Yes, sir; I have gone to sea in other than——

[fol. 657] Q. As an officer of ships?

A. Not in the merchant service. I have never served on merchant service.

Q. You have served on naval ships only?

A. During the war I went to sea on other than naval vessels in my capacity as naval officer.

Q. You have had experience with plates rusting, through leaky rivets which rust and stop the leakage?

A. Stops leakage temporarily but never permanently.

(Witness excused.)

Mr. Keating: If your Honor please, I wish to offer in evidence the bills of lading produced by Mr. Jones which I understand cover all the shipments in the so-called Cudahy libel.

Mr. Jones: I suggested to Mr. Keating, with respect to that libel, if your Honor please, that we let that stand for the time being; that without prejudice to either side, either side may produce in evidence anything in connection with that particular libel. We don't want to take advantage of each other, so I think any connection that may rest in respect of that libel may be dealt with hereafter. No answer has been filed yet, but I told Mr. Keating we wouldn't take advantage of that. It isn't at issue and it isn't here, and I think the better way to deal with it is to leave that matter in statu quo.

My friend may rest content that I am not going to take advantage of any technical position, and I know he will not take advantage of any technical position.

[fol. 658] I think in view of the pleadings of the case it would be well to leave that in abeyance.

Mr. Keating: When Mr. Jones said to me that he understood I am not going to take a technical position, I claim this suit was filed too late.

Mr. Jones: I don't call that technical. I call that a real defense.

If your Honor please, we both want to submit memoranda, and it is necessary for me to go to Europe on some very important business. I wonder whether your Honor could set some day in January to argue the case or submit briefs.

The Court: There is no hurry. Suit your own convenience. You do not have to take up the question of when you want to submit. If you want to argue I will set a time.

(Short discussion off the record.)

The Court: Just submit the briefs.

Mr. Keating: One of us ought to serve the brief on the other and answer.

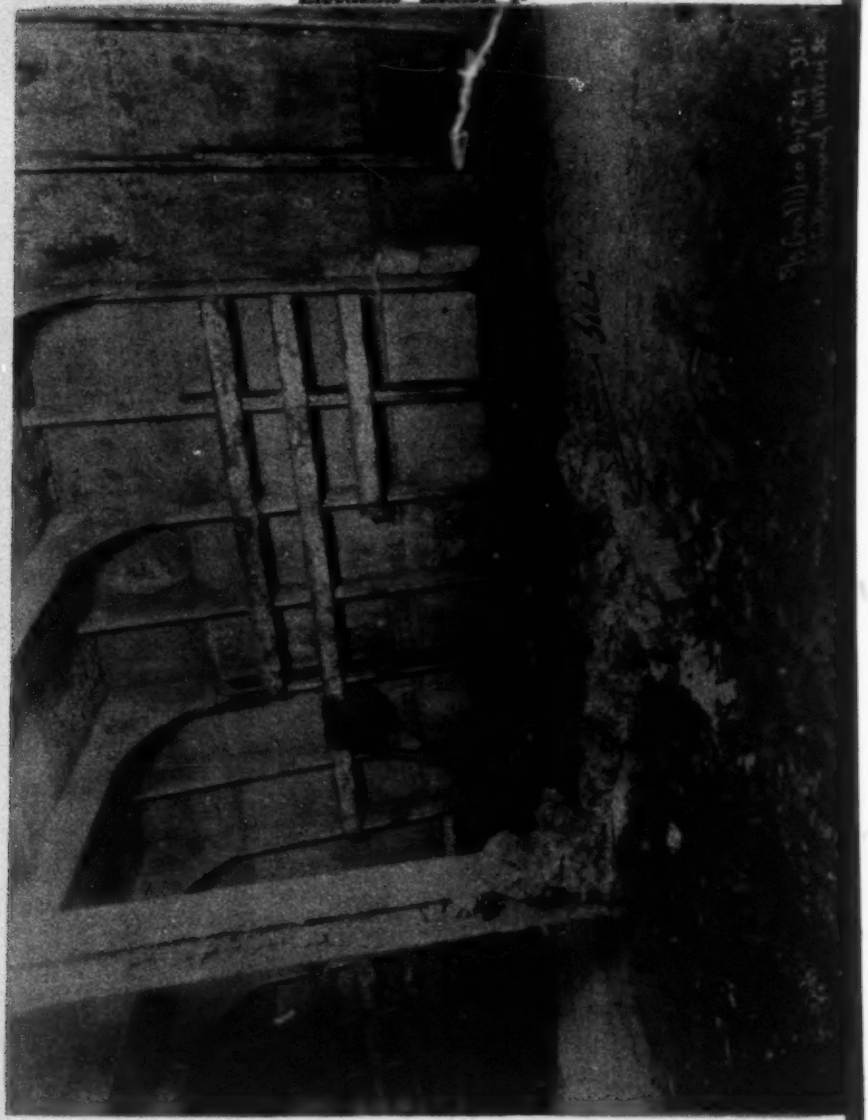
The Court: I suggest that each serve a brief and exchange it and then each reply to his opponent's brief, if he wants to reply.

Mr. Keating: I think one of us ought to serve his brief on the other party as a moving party and the other party——

Mr. Jones: I would prefer your suggestion, your Honor.

The Court: Two principal briefs and two replies.

Libellants' Exhibit 1.



659-A

[fol. 659] LIBELLANTS' EXHIBIT 1

(Photoprint, side folio 659-a)

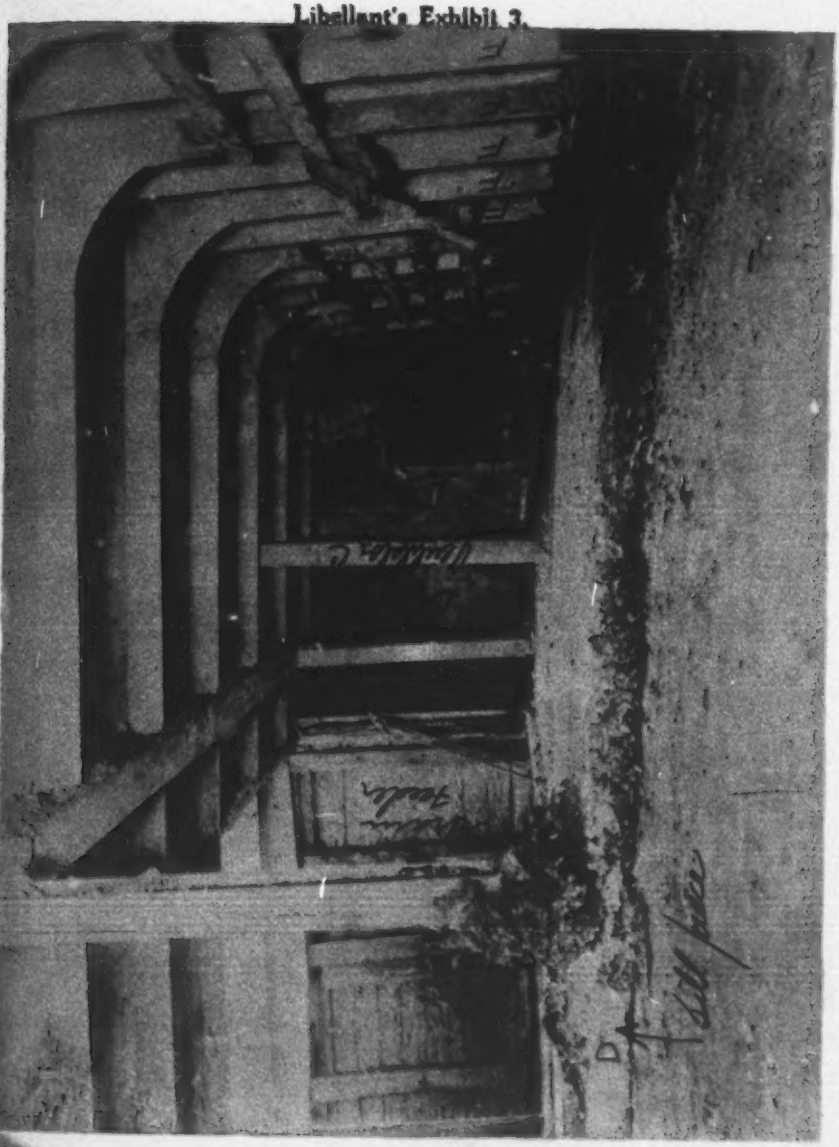
[fol. 660] LIBELLANTS' EXHIBIT 2

(Photoprint, side folio 660-a)

Libellants' Exhibit 2.

660-A

Libellant's Exhibit 3.



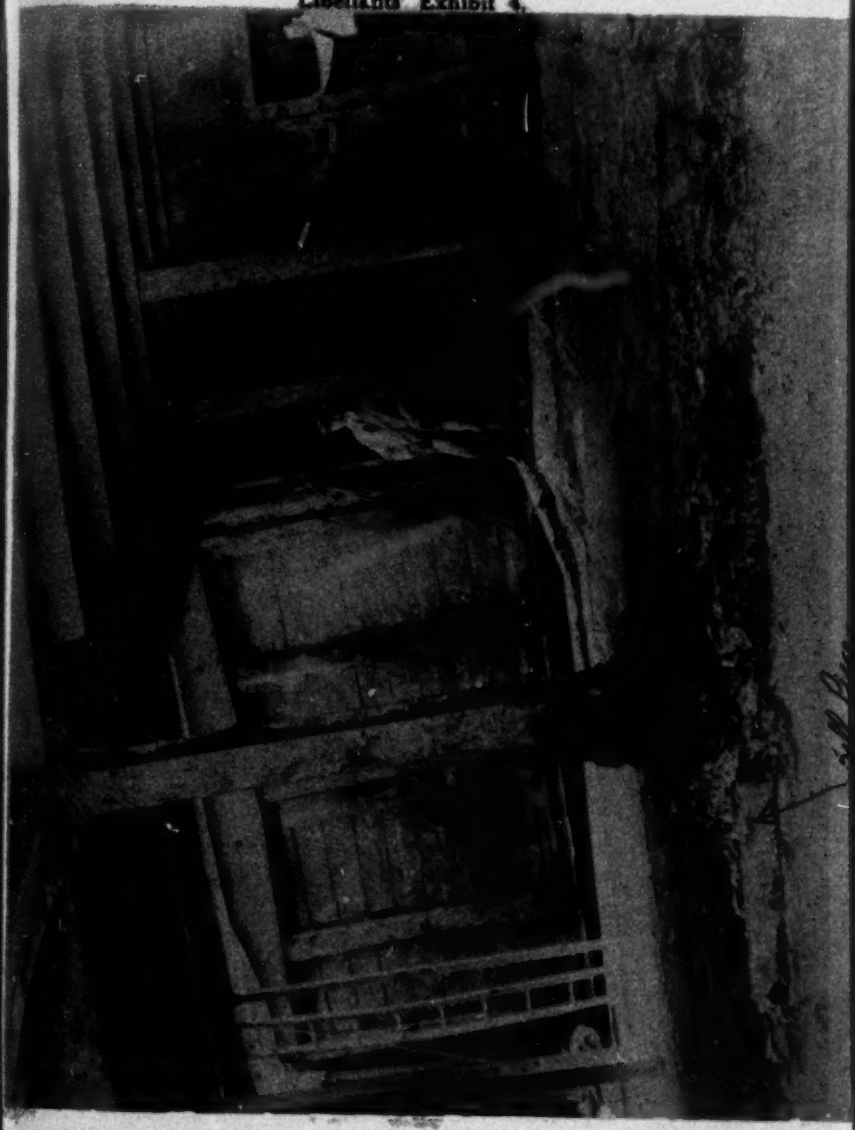
[fol. 661] LIBELLANTS' EXHIBIT 3

(Photoprint, side folio 661-a)

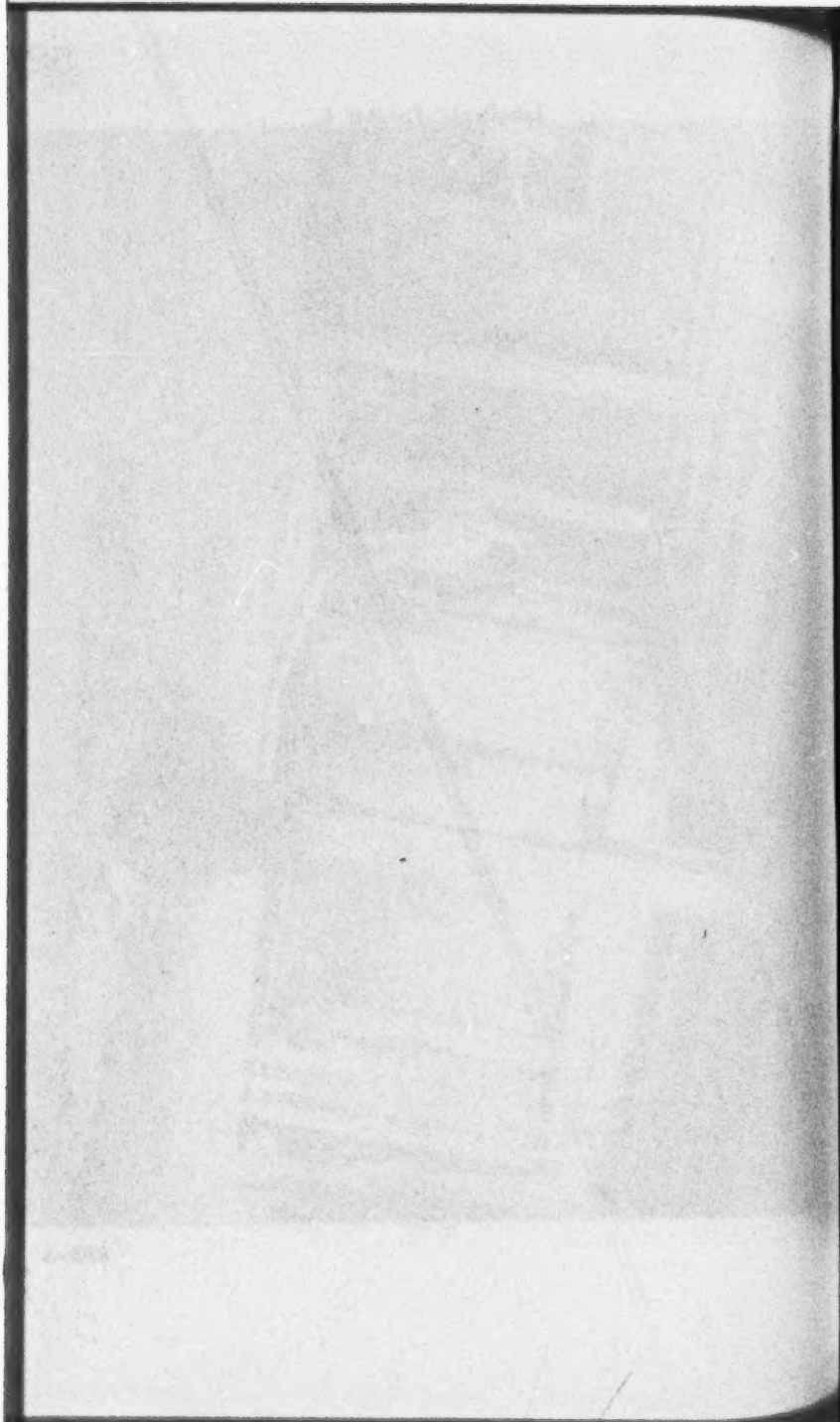
[fol. 662] LIBELLANTS' EXHIBIT 4

(Photoprint, side folio 662-a)

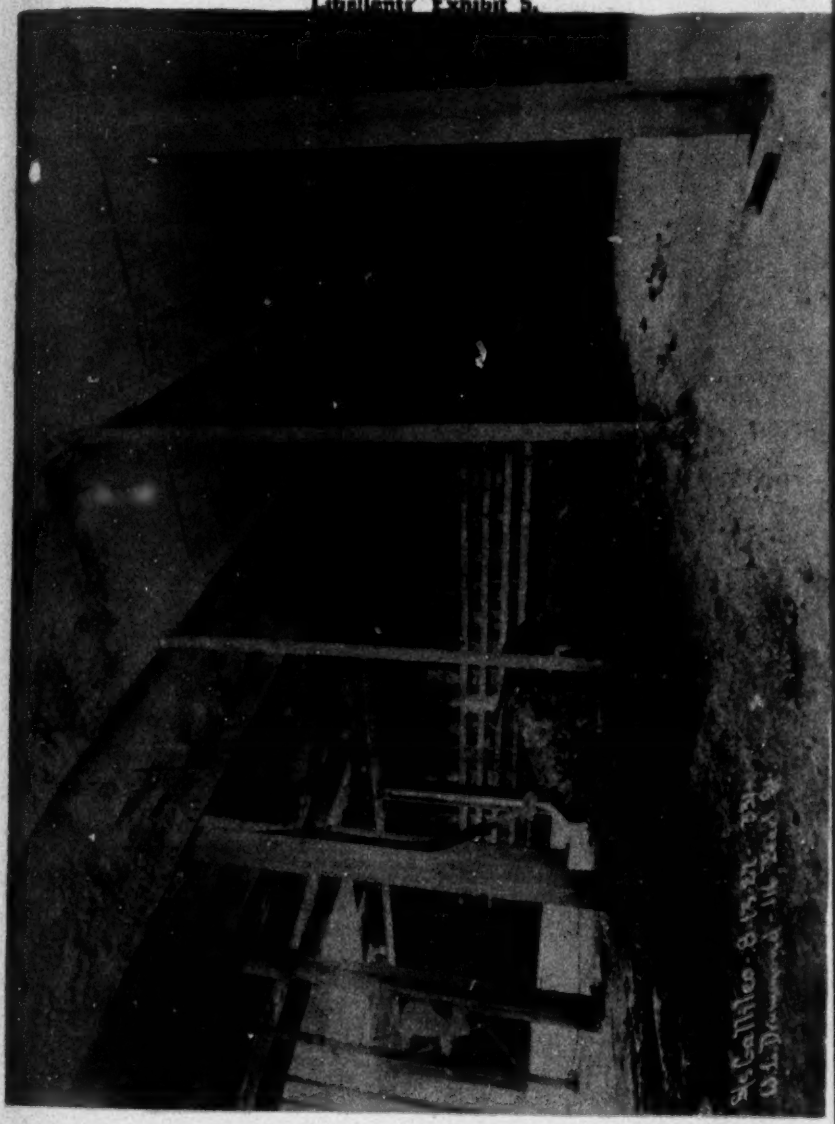
Libellants' Exhibit 4.



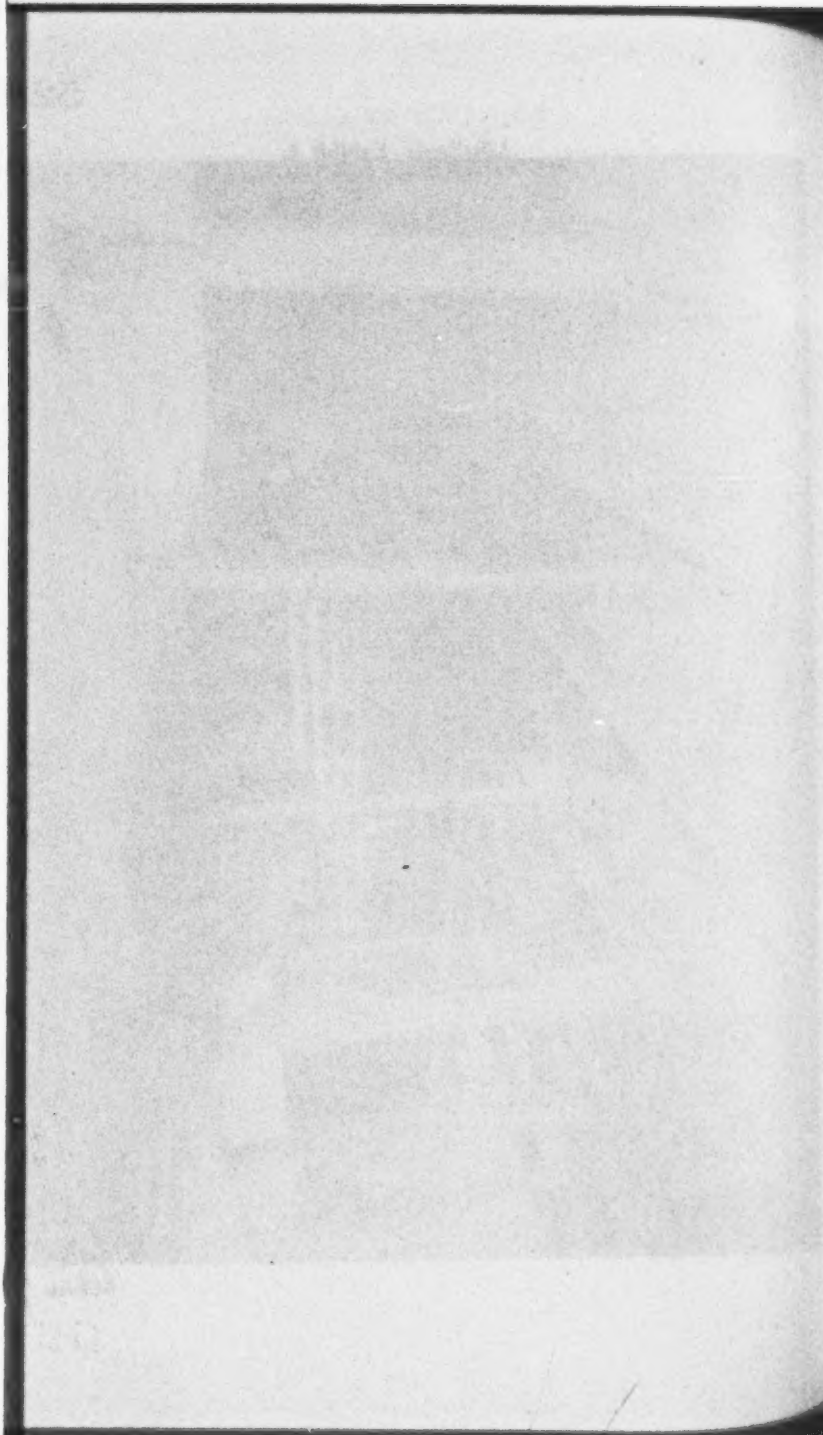
652-A



Libellants' Exhibit 5.



663-A



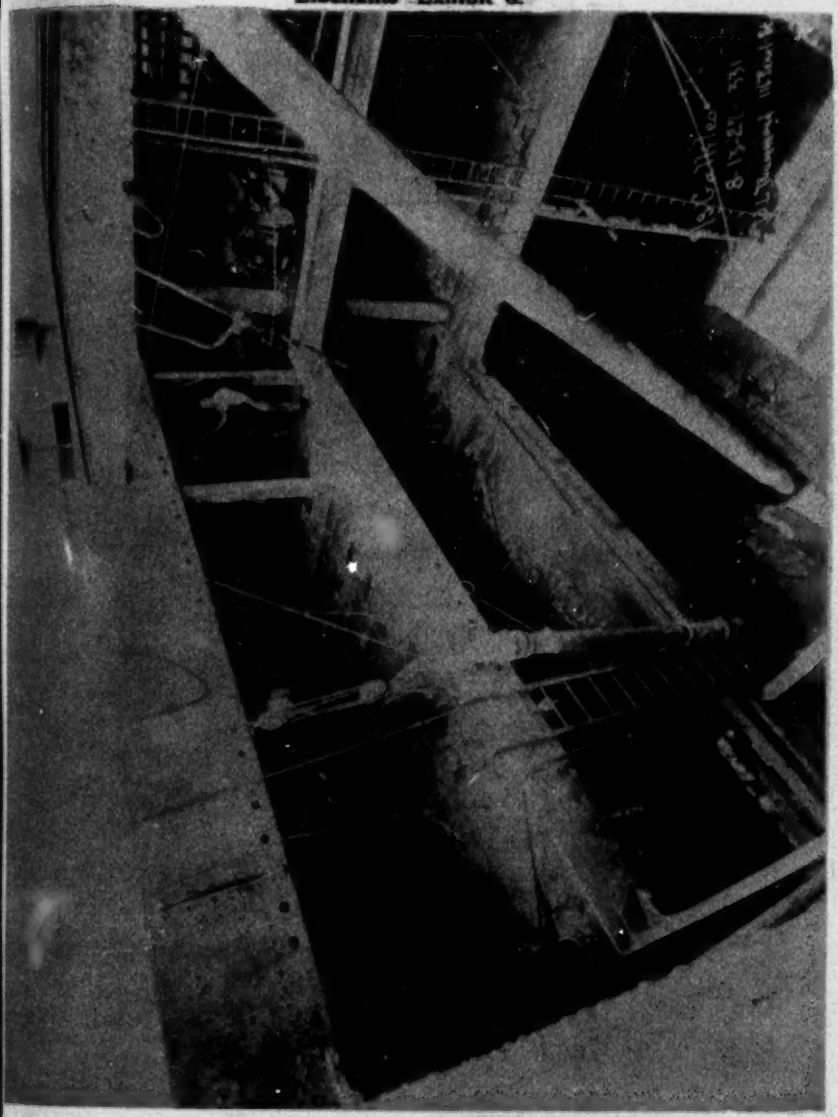
[fol. 663] LIBELLANTS' EXHIBIT 5

(Photoprint, side folio 663-a)

[fol. 664] LIBELLANTS' EXHIBIT 6

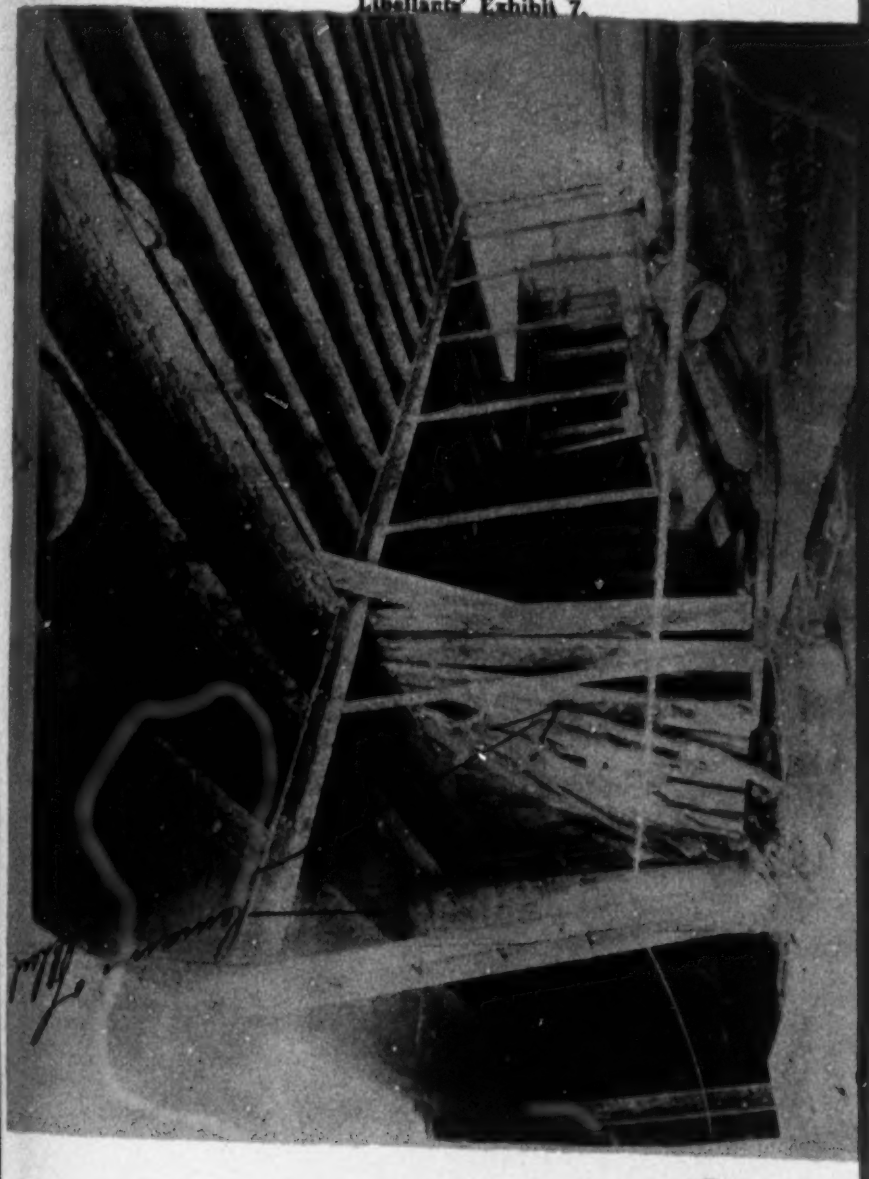
(Photoprint, side folio 664-a)

Libellants' Exhibit 6.



661-A

Libellants' Exhibit 7.



665-A

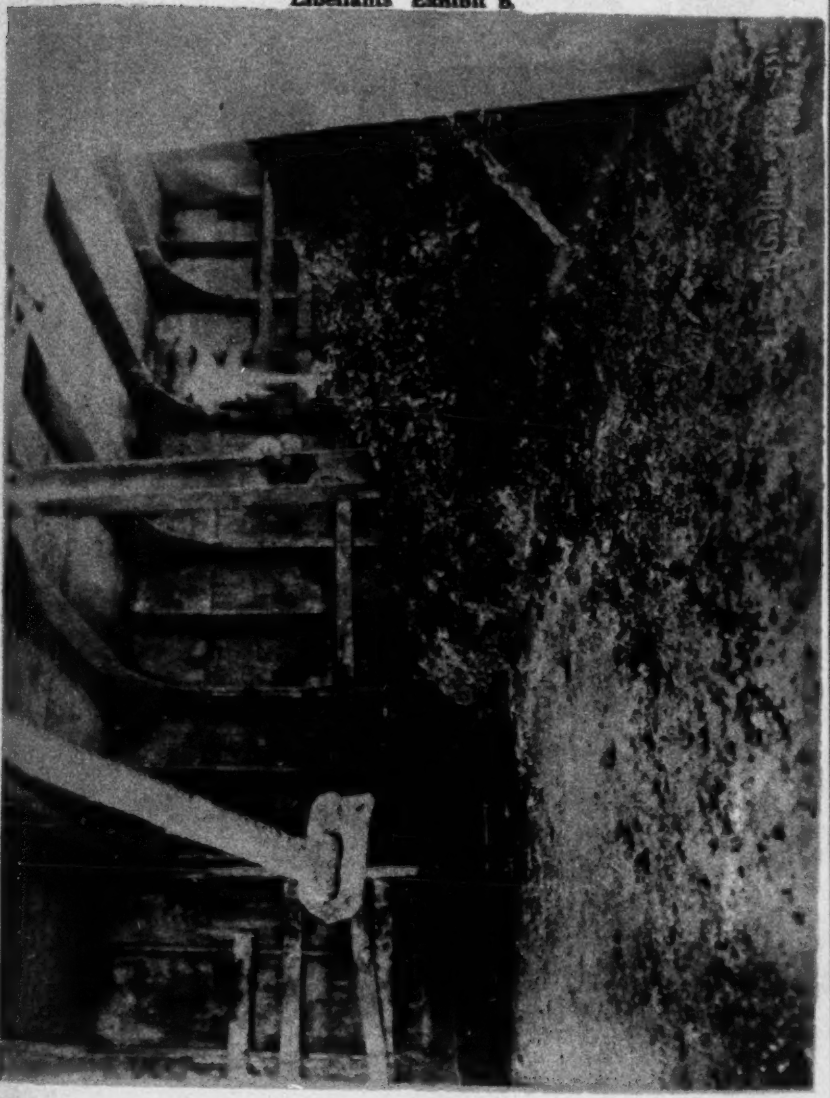
[fol. 665] LIBELLANTS' EXHIBIT 7

(Photoprint, side folio 665-a)

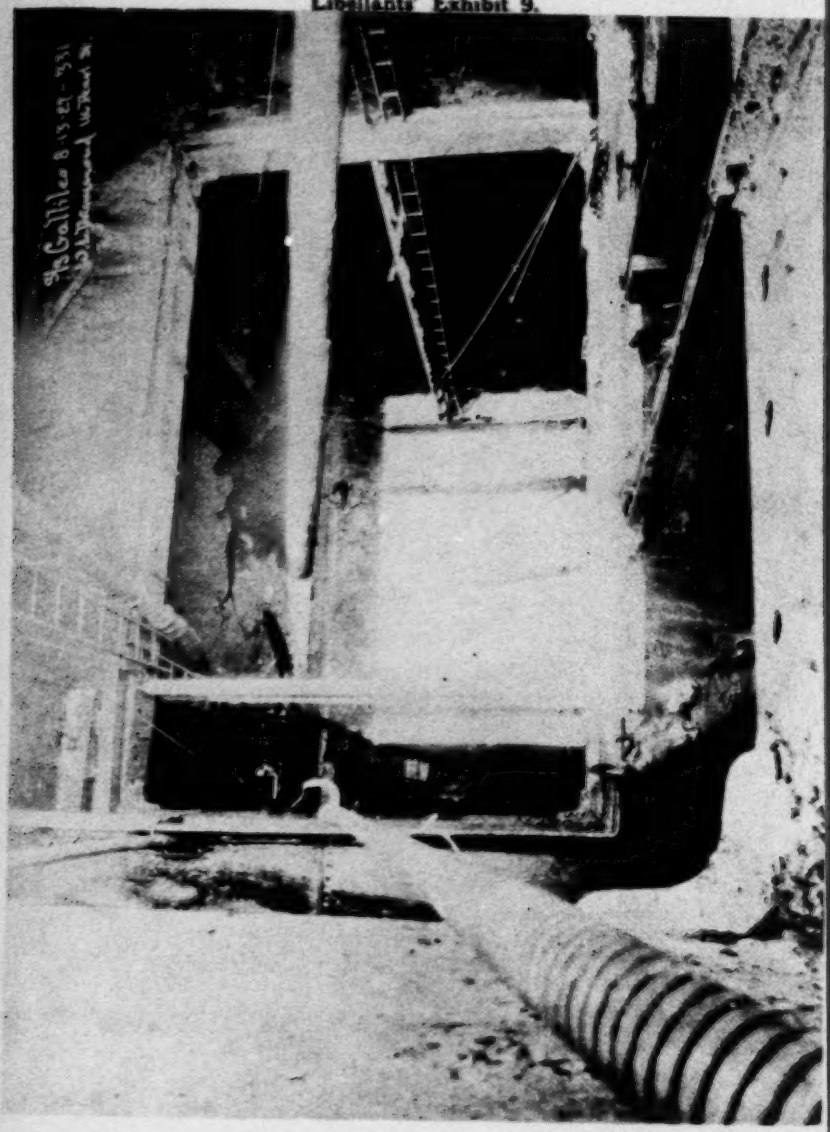
[fol. 666] LIBELLANTS' EXHIBIT 8

(Photoprint, side folio 666-a)

Libellants' Exhibit 8



Libellants' Exhibit 9.



667-A

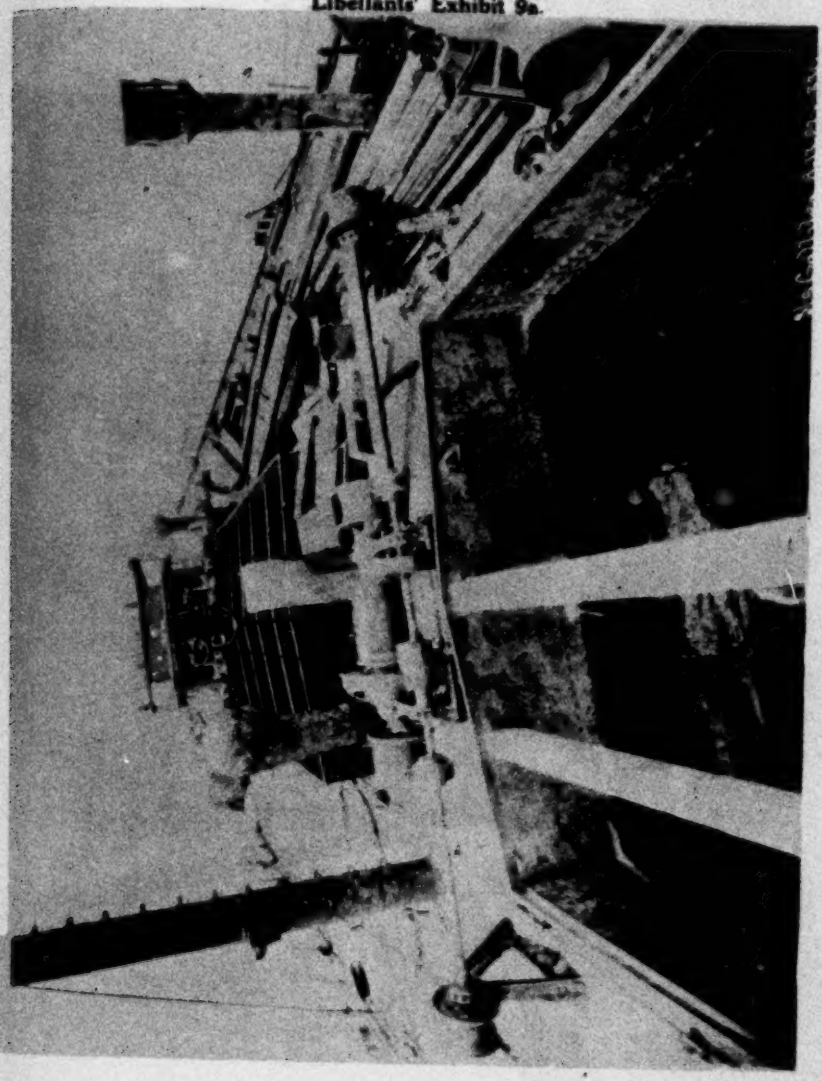
[fol. 667] LIBELLANTS' EXHIBIT 9

(Photoprint, side folio 667-a)

[fol. 668] LIBELLANTS' EXHIBIT 9a

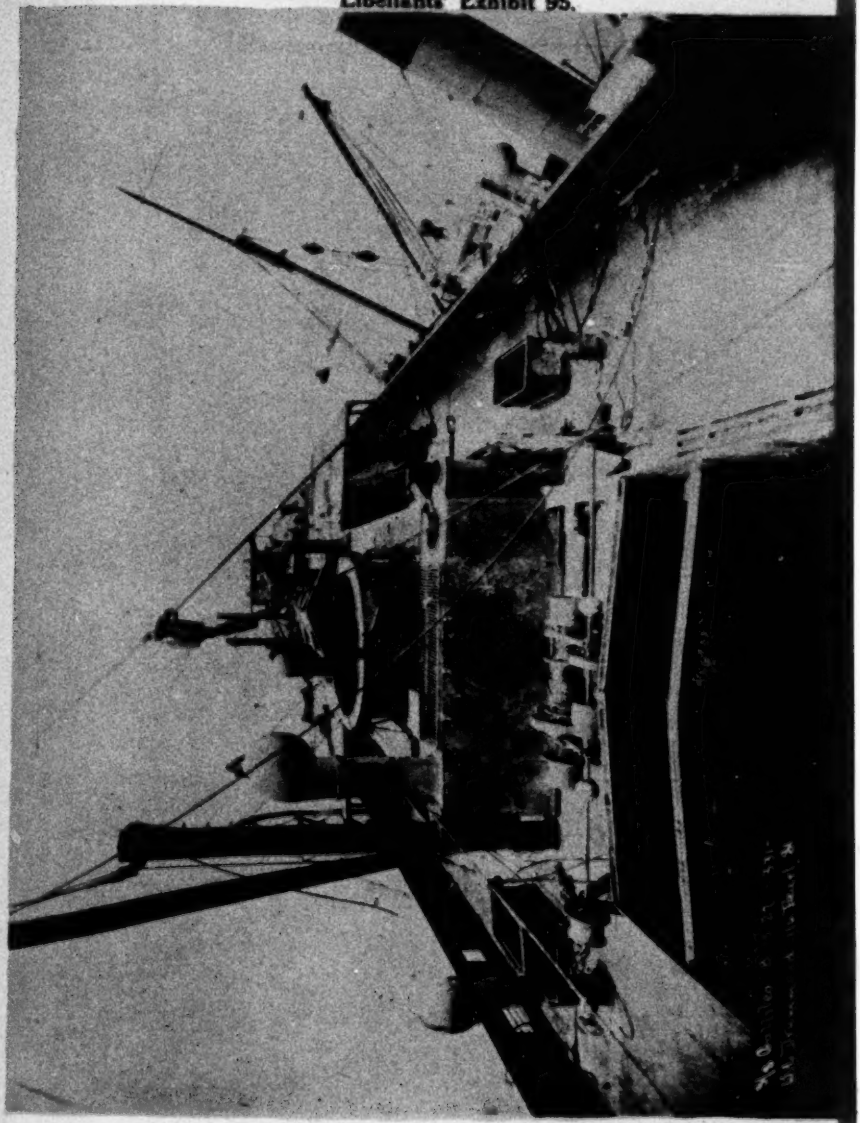
(Photoprint, side folio 668-a)

Libellants' Exhibit 9a.



668-A

Libellants' Exhibit 9b.



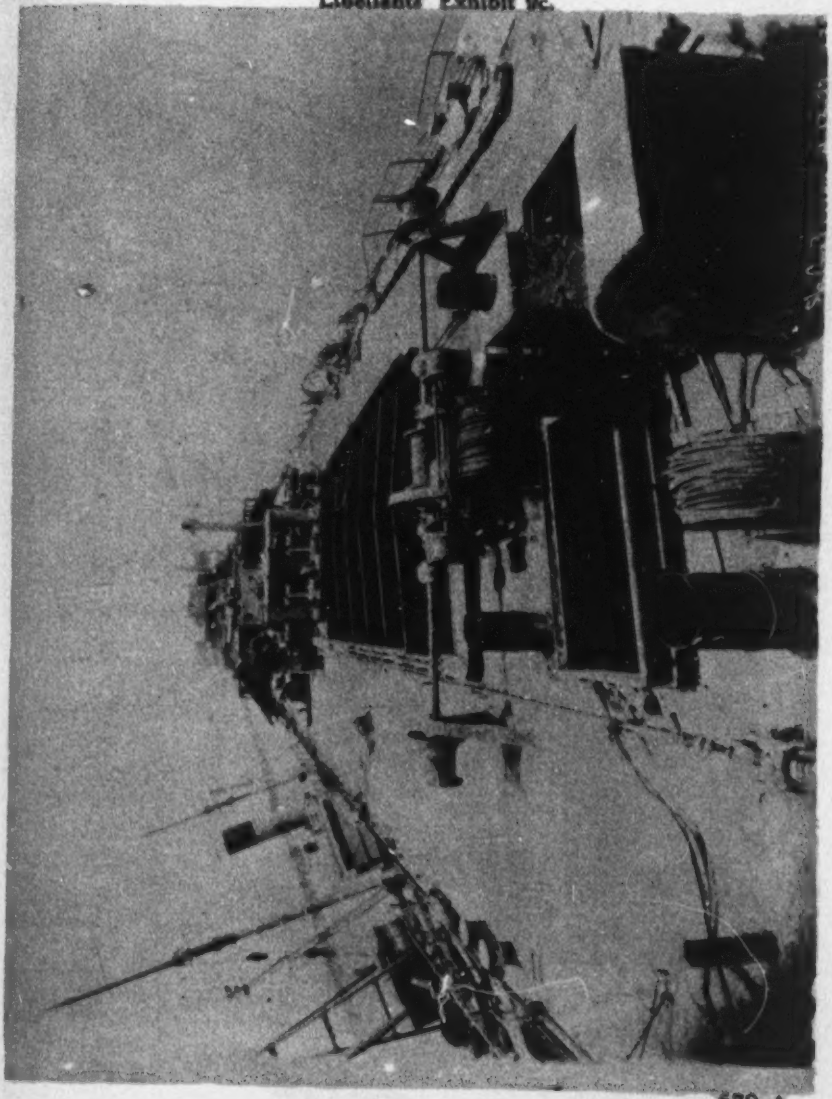
[fol. 669] LIBELLANTS' EXHIBIT 9b

(Photoprint, side folio 669-a)

[fol. 670] LIBELLANTS' EXHIBIT 9c

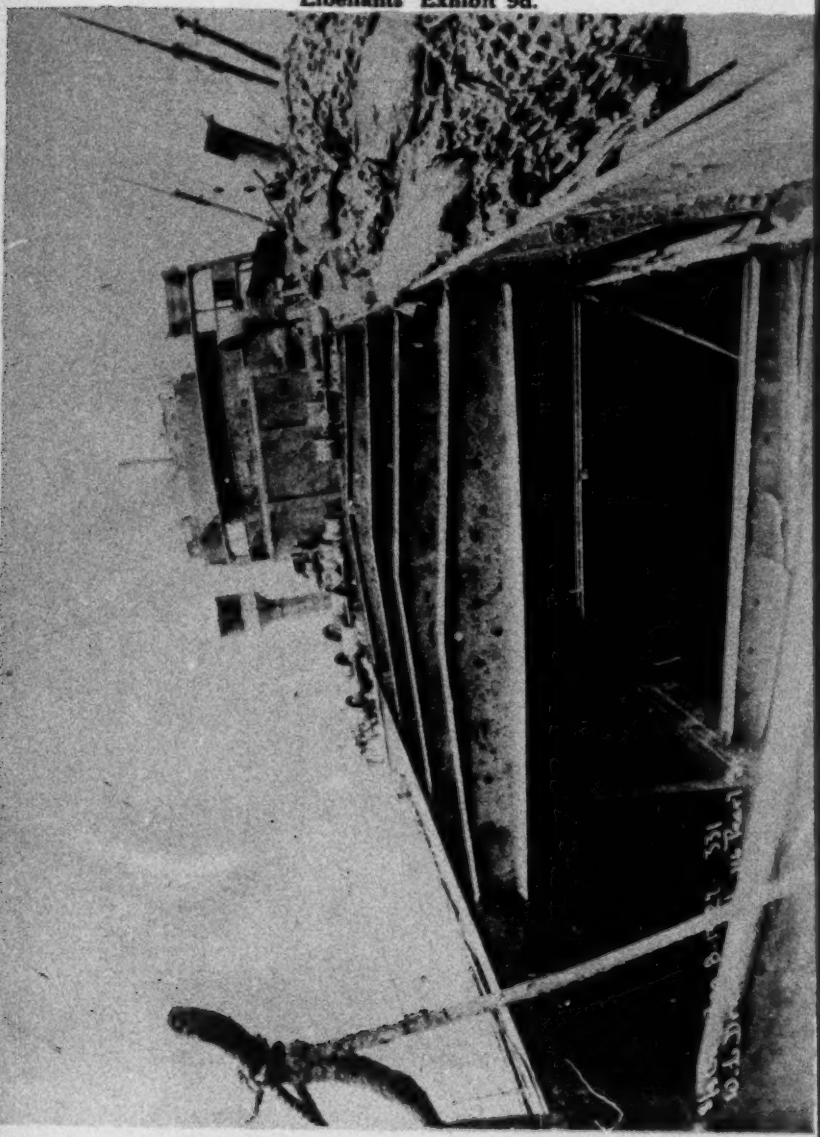
(Photoprint, side folio 670-a)

Libellants' Exhibit 9c.



670-A

Libellants' Exhibit 9d.



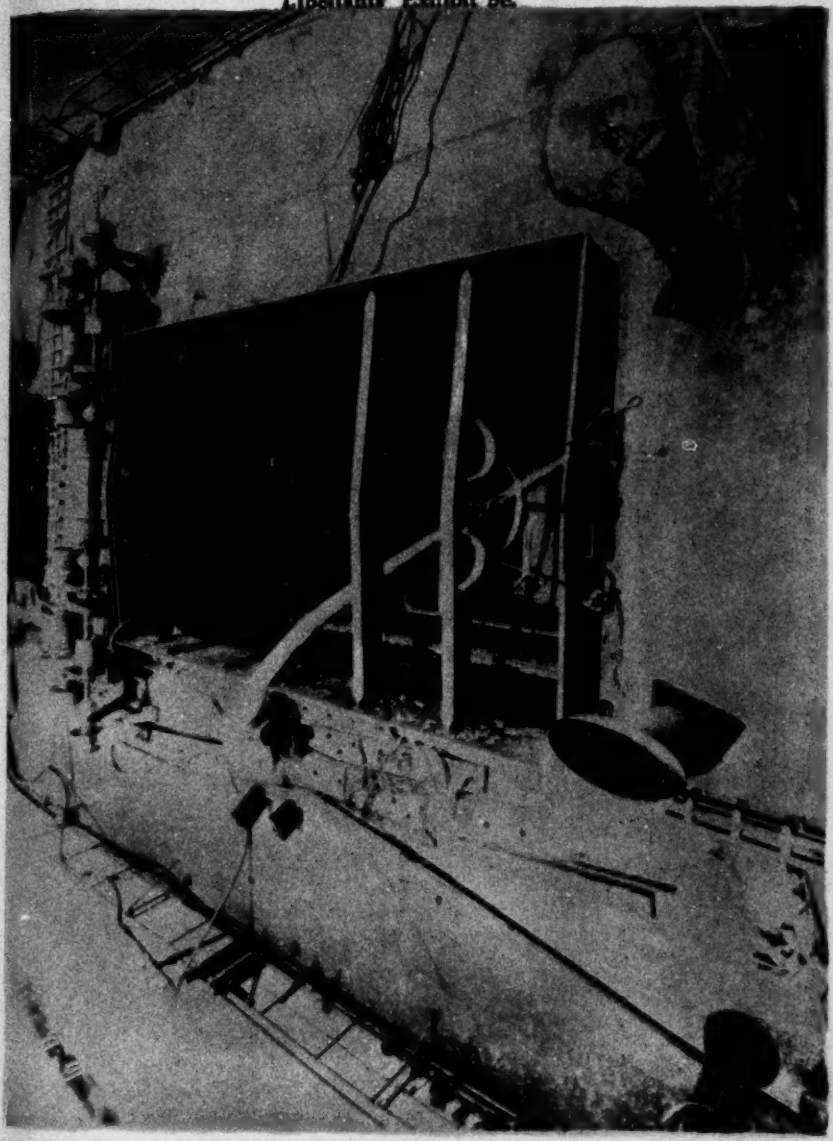
[fol. 671] LIBELLANTS' EXHIBIT 9d

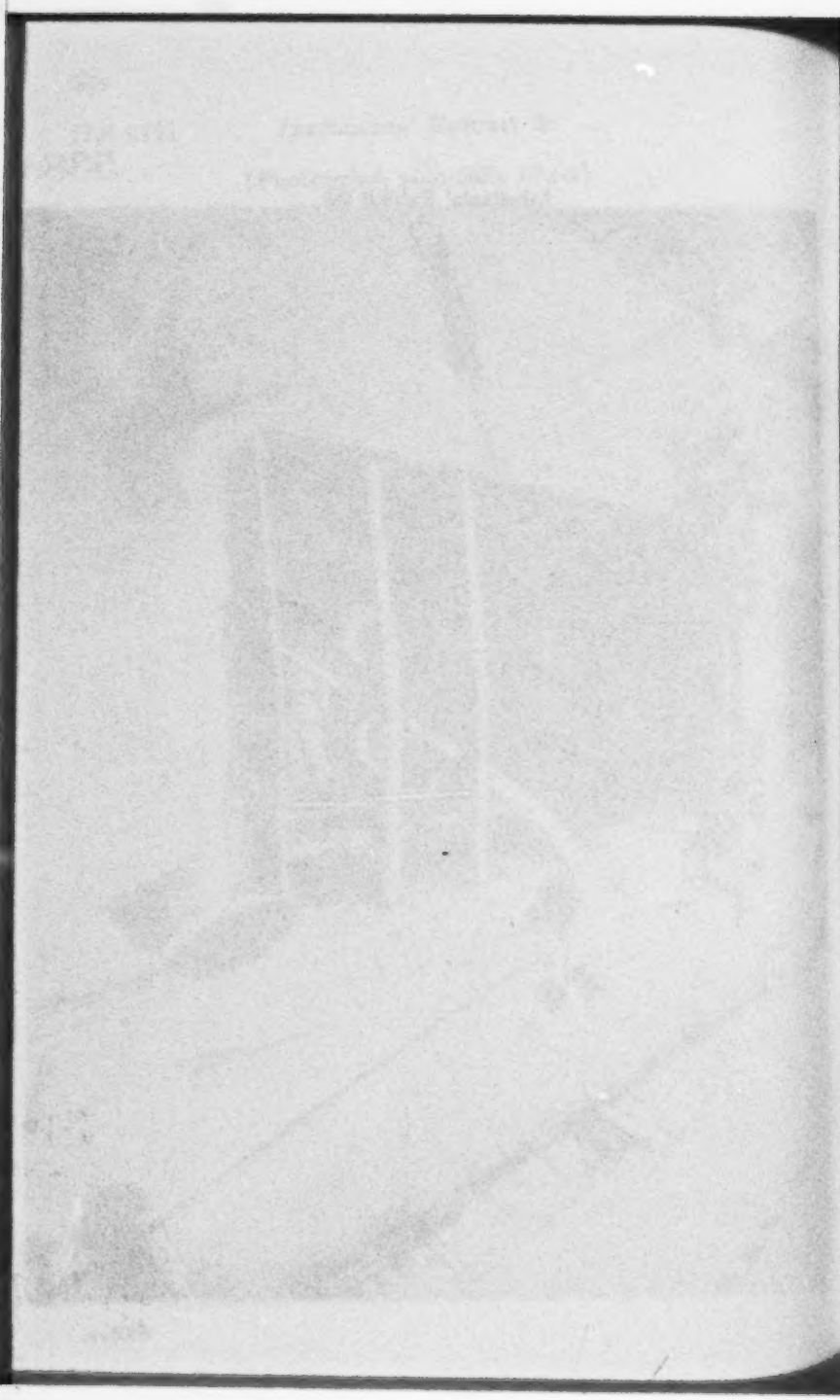
(Photoprint, side folio 671-a)

[fol. 672] LIBELLANTS' EXHIBIT 9e

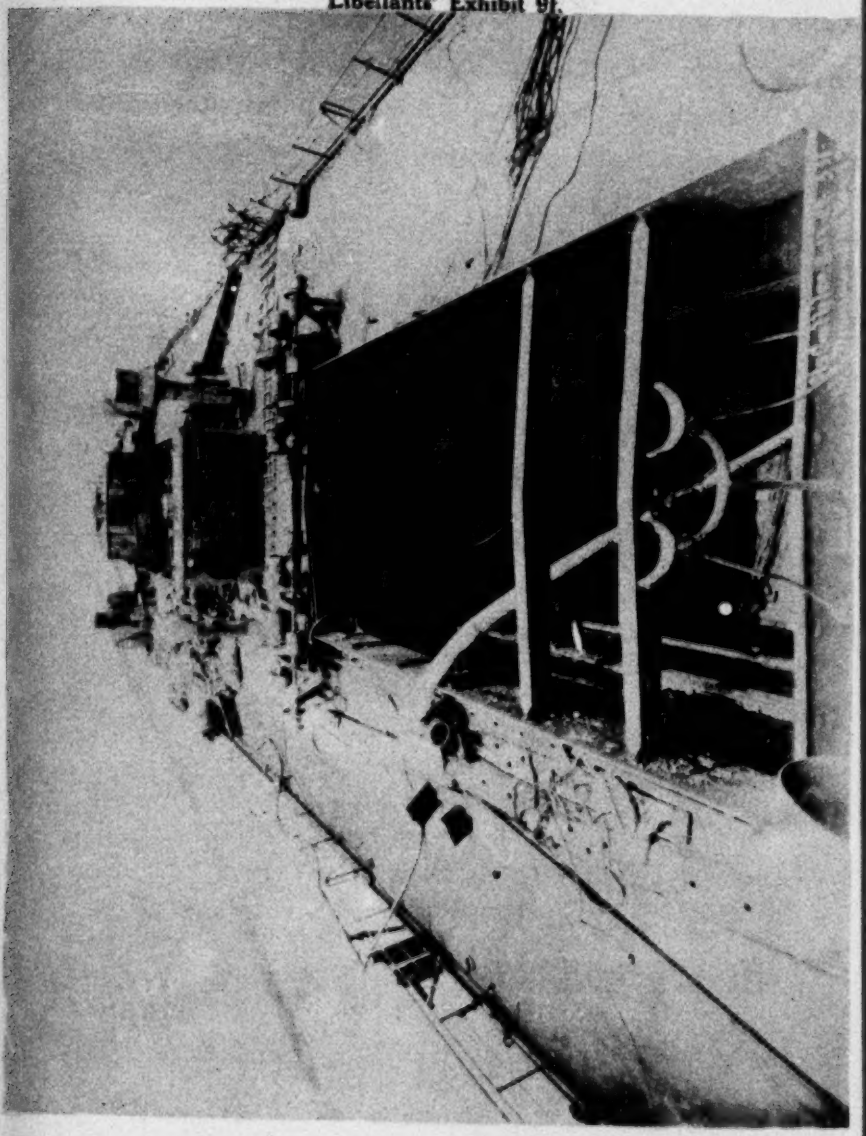
(Photoprint, side folio 672-a)

Libellants' Exhibit 9a.





Libellants' Exhibit 9f.



[fol. 673] LIBELLANTS' EXHIBIT 9f

(Photoprint, side folio 673-a)

[fol. 674] LIBELLANTS' EXHIBIT 10

(Photoprint, side folio 674-a)

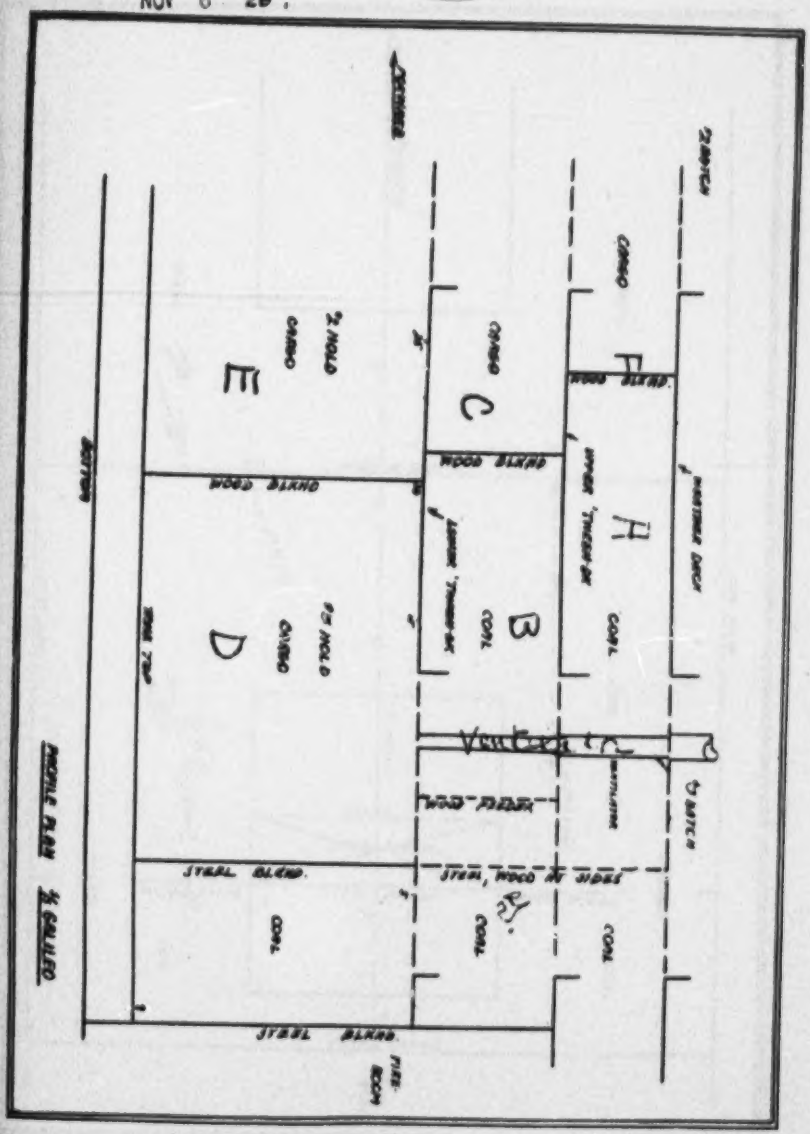
Libelants' Exhibit No.

540A

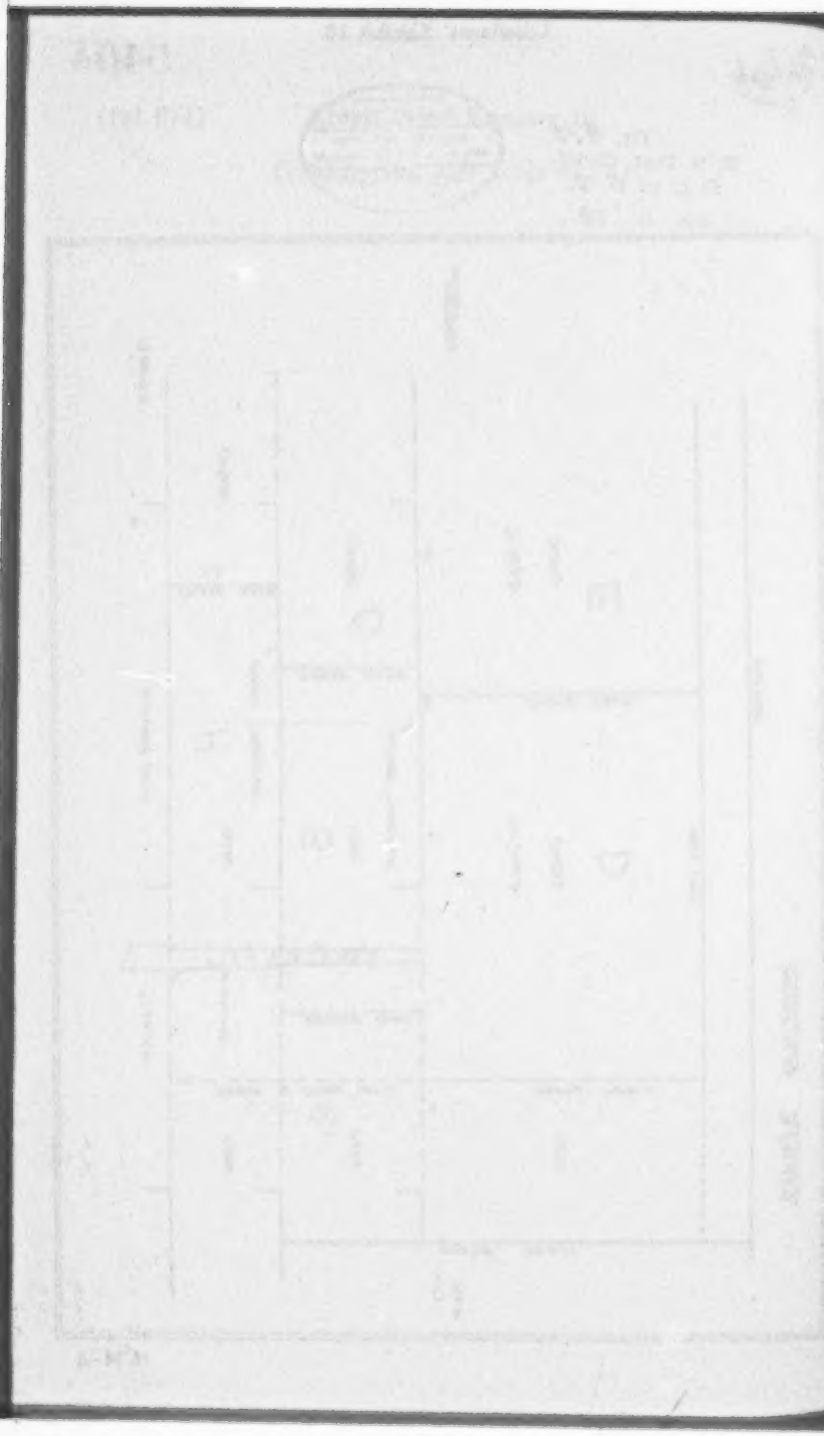
96/206

Ex. #10
U. S. Dist. Court,
S. D. of N. Y.
NOV 6 '29.

H. A. RIEGER



674-A

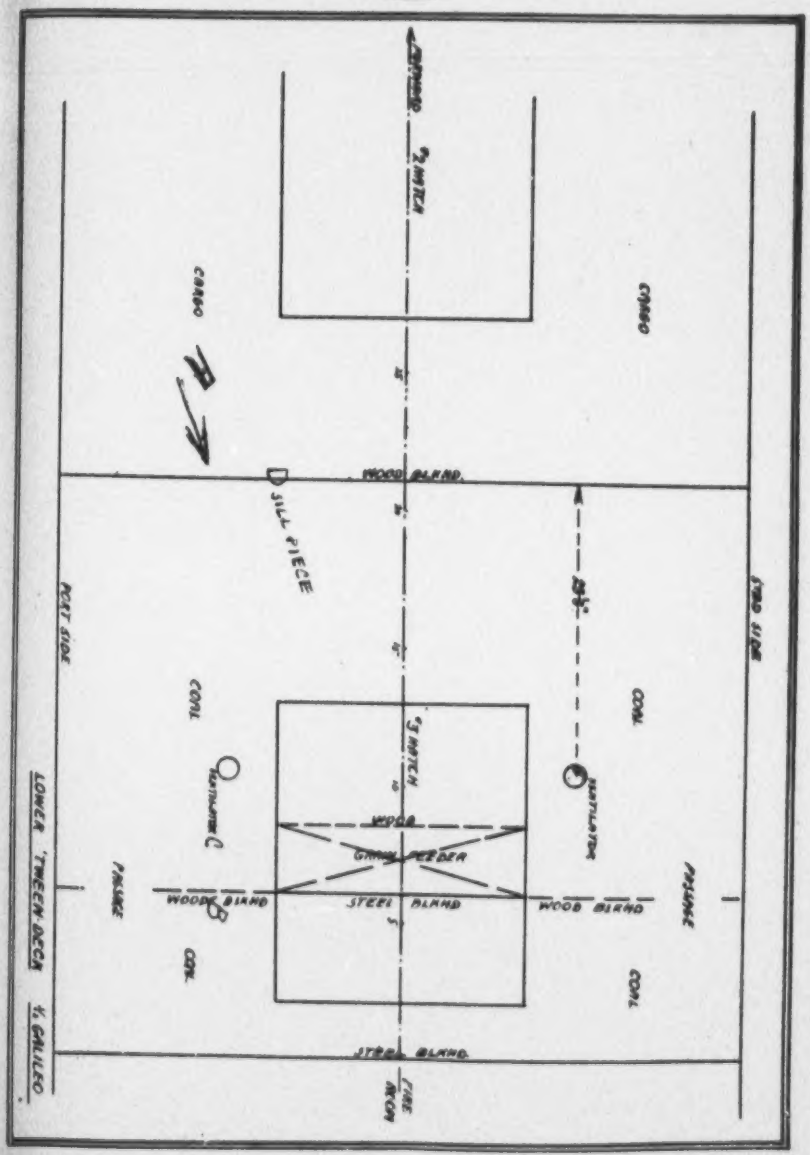


Libellants' Exhibit 11.

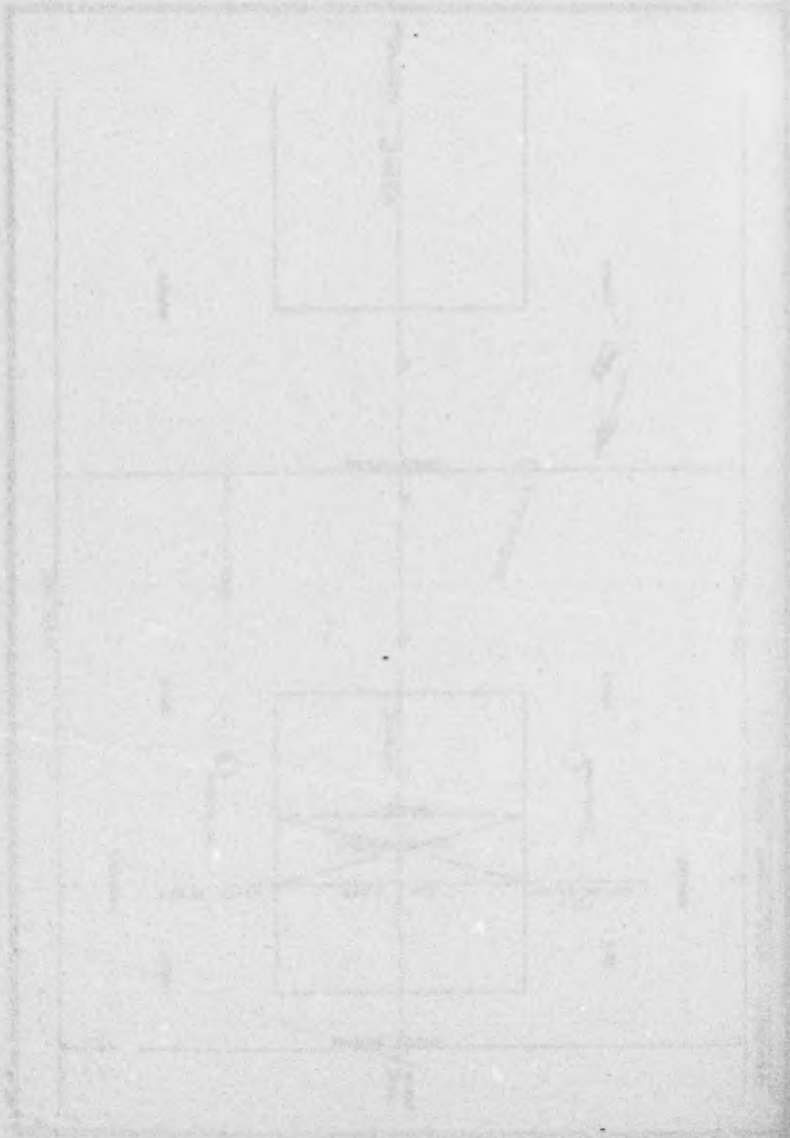
540B

96/306.

Ex. #11
U. S. Dist. Court
S. D. of N. Y.
NOV 6 '29.



675-A



[fol. 675] LIBELLANTS' EXHIBIT 11

(Photoprint, side folio 675-a)

[fol. 676] LIBELLANTS' EXHIBIT 12

(Photoprint, side folio 676-a)

Libellants' Exhibit 12.

B

Ex. 4/2
U. S. Dist. Court
S. D. of N. Y.
NOV 6 20

542A

676-A

FOLD OUT IS TOO LARGE TO BE FILMED

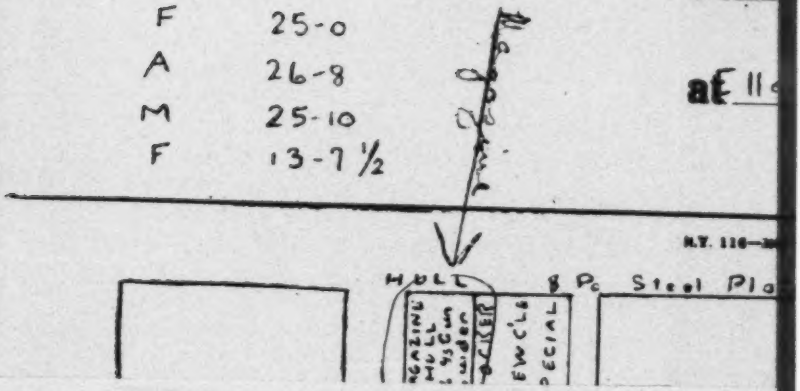
Libellants' Exhibit 13.

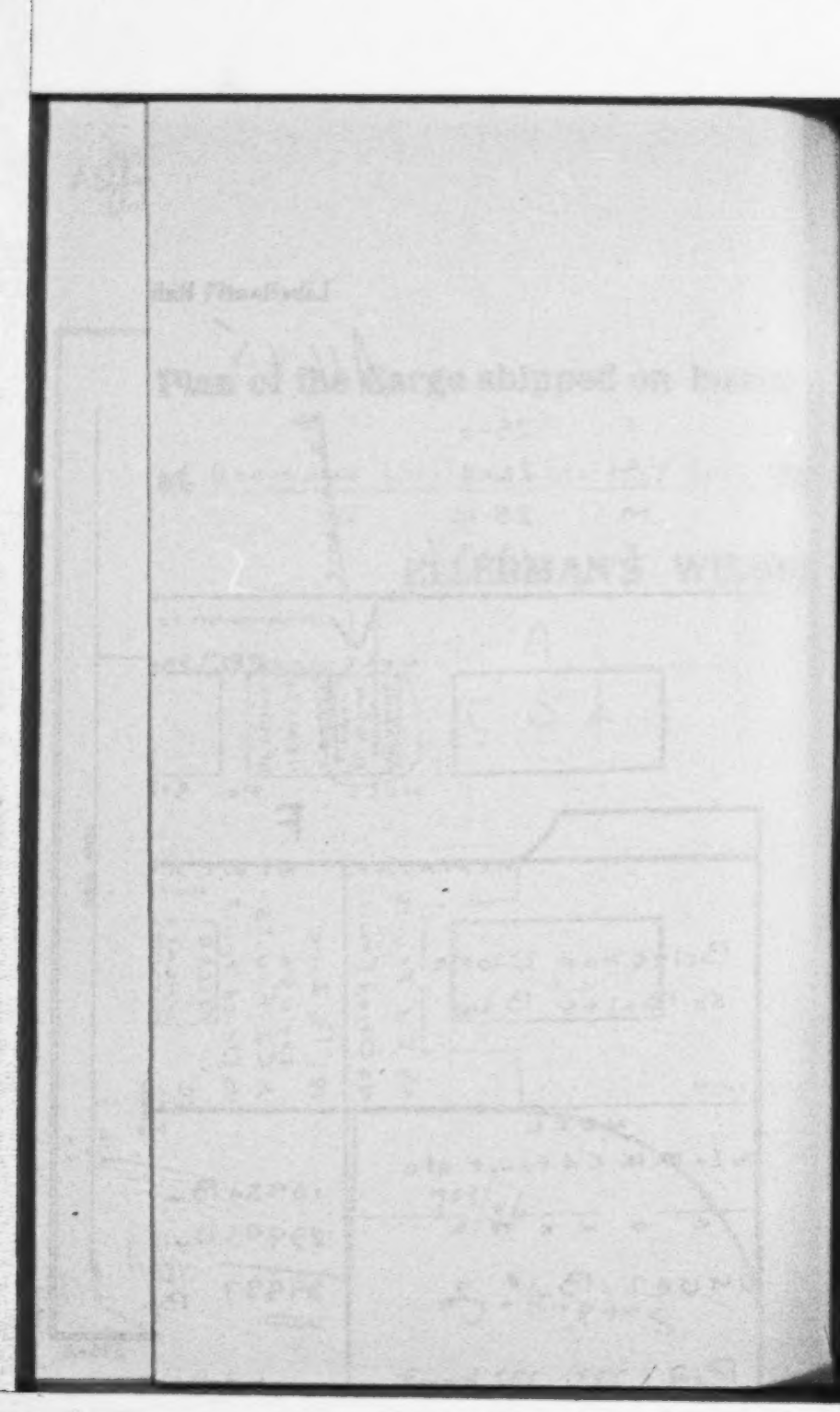
A1645

- Plan

at 11

F 25-0
A 26-8
M 25-10
F 13-7½





[fol. 677] LIBELLANTS' EXHIBIT 13

(Photoprint, side folio 677-a)

[fol. 678] LIBELLANTS' EXHIBIT 14

August 20th, 1927.

Messrs. Bigham, Englar & Jones, # 64 Wall Street, New York, N. Y.

DEAR SIRS:

Re British S/S "Galileo"

As requested we proceeded on board this vessel on August 12th, 1927, for the purpose of a-certaining the place of origin of the fire which occurred on this vessel late in 1926 and which culminated in her sinking off Weehawken, N. J. The vessel lay sunk on her beams end and most of her cargo was removed through holes cut in the port shell. Subsequently the vessel was salvaged by the Merritt-Chapman & Scott Corp., and taken to Gravesend Bay, Brooklyn. We found the vessel lying listed about twenty-five degrees to starboard and the salvors engaged in cleaning up.

This vessel is of the shelter-deck type with three steel decks. The side or shell frames are spaced twenty-seven inches in the holds, lower 'tween-deck, and upper 'tween-deck (or shelter-deck) spaces but the deck beams for the two lower decks are on alternate frames while the weather deck beams are on every frame. The enclosed sketches show the arrangement of the hatches, bulkheads, etc., forward of the forward boiler room bulkhead. This bulkhead is of steel extending from the D. B. tank top to the upper 'tween-deck. There is a steel bulkhead twelve feet forward of this which extends up to the weather deck but in the lower and upper 'tween-deck spaces it is of steel only [fol. 679] in the hatchways while at the sides or wings of these compartments it is of wood covered with burlap and fitted with passageways. In the lower 'tween-deck compartment this steel bulkhead serves as the after part of the grain feeder for # 3 hatch extending five feet fore-and-aft, the width of the hatch, and from the lower 'tween-deck to the upper 'tween-deck. There is a wooden bulkhead between the # 2 and # 3 lower holds. In the lower 'tween-deck there has evidently been a wooden bulkhead at the 21st frame forward of the boiler room bulkhead as on the portside of the deck there is a piece of the sill remain-

ing which is commed or shored off from a nearby stanchion. Also there is a quantity of caked coal and grease at this place about fifteen feet athwartship, one to three feet fore-and-aft and three inches to two feet high. On the starboard side there is also a pile of coal and grease about twelve feet athwartship, six feet fore-and-aft, and two to three feet high. These two piles are banked up square at the forward edges indicating the presence of a bulkhead, subsequently removed. The upper 'tween-deck space has had a light wooden bulkhead about seven feet aft of the after end of # 2 hatch; some of the bulkhead is still in place.

The lower 'tween-deck plating and beams show no distortion. The wooden sills at the hatches are not scorched nor are the fore-and-aft shifting boards in the hold underneath effected. However, the sides of the lower 'tween deck are somewhat blistered, especially along the port side abreast of the after end of # 2 hatch where the cargo battens were badly burned. The overhead deck (upper 'tween-deck) was badly distorted just aft of the # 2 hatch and [fol. 680] especially to port of the center-line. The beam forming the after end of # 2 hatch was scorched and very slightly buckled; the first beam aft of this was badly buckled from the bracket at the port side to about four feet to starboard of the centerline; the next beam aft of this was badly buckled from the bracket at the port side to about twelve feet to starboard of the centerline; the next beam aft of this was buckled on the port side and close to the centerline; the beams abaft of this were little if any distorted. The plating of the upper 'tween-deck in way of these beams was badly buckled. The fore-and-aft deck stringer extending between the port coamings of the # 2 and # 3 hatches was buckled from the after end of the # 2 hatch to just abaft the piles of caked coal and grease.

It was evident that the fire had been in the lower 'tween-deck and quite local in extent inasmuch as the distorted parts are confined to the limited area described above and indicated on the enclosed sketches. The hottest part of the fire has been from the after end of # 2 hatch to the wooden bulkhead between the # 2 and # 3 hatches in a fore-and-aft direction and from about five feet to starboard of the

centerline to about twenty feet to port of the centerline in an athwartship direction.

It is obviously impossible to ascertain from an inspection at this time whether the fire started forward or aft of the wooden bulkhead at this place. The fire has been hottest forward of the bulkhead but this may be due to the nature of the cargo. We note from the extract of the vessel's log-book dated at 4:35 p. m. August 28th, 1926, "smoke was observed coming from the forward starboard [fol. 681] ventilator at No. 3 hold". This ventilator leads to the 'tween-deck space described above and which contained coal. Our investigation indicated that the fire could have had its origin in this space but it is impossible for anyone to state definitely, from the physical evidence now available, where the fire originated. Nothing found by us, however, leads us to doubt the accuracy of the statement which we have quoted from the ship's log.

Very truly yours, Wm. R. Bagger, Alfred E. Jordan, Wm. G. McKennan.

[fol. 682] LIBELLANTS' EXHIBIT 14

(Part Photoprint)

(Here follow side folios 682-a, 682-b, and 682-c)

Libellants' Exhibit 14.

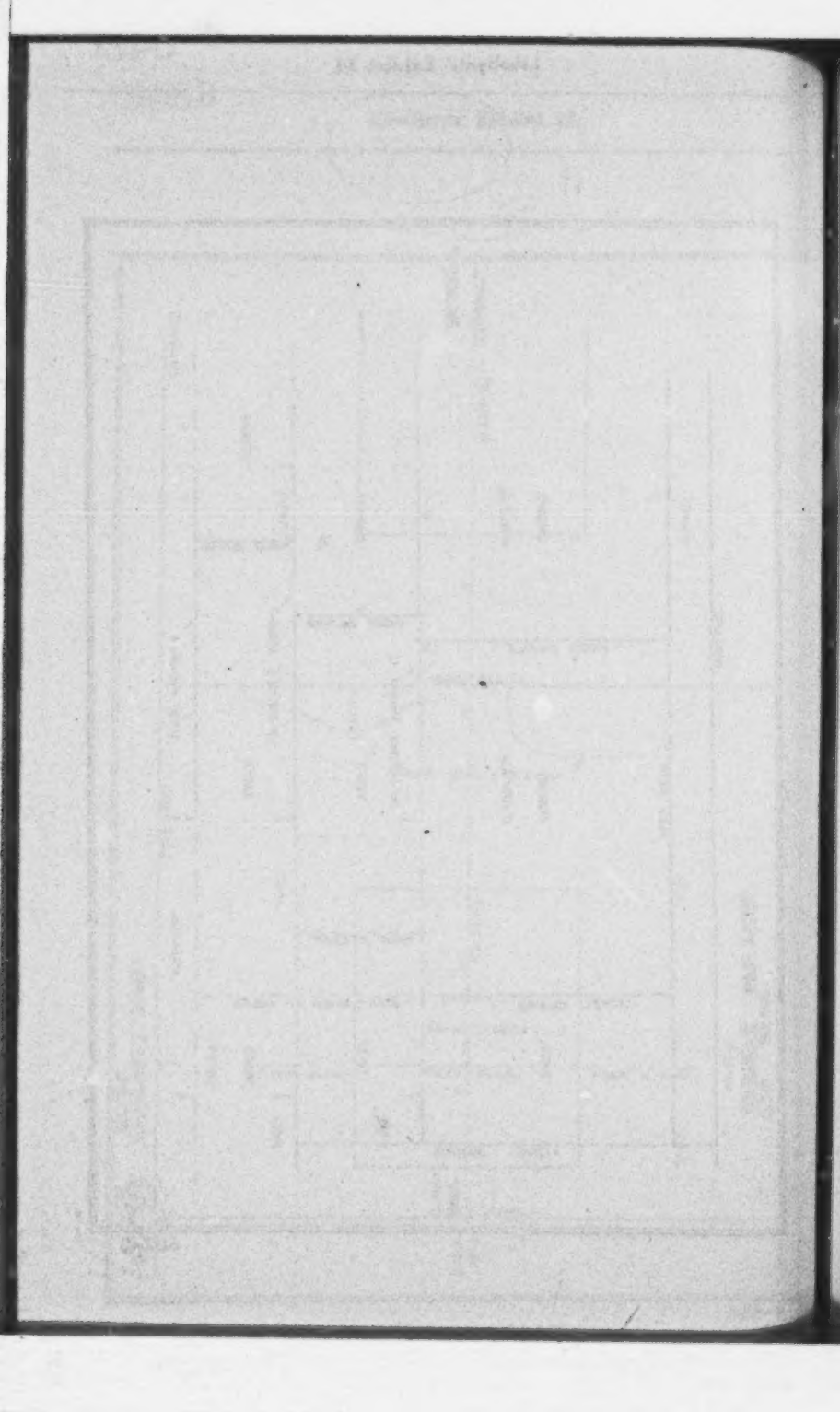
682-A

546B

Libellants' Exhibit 14.

682-B

STARBOARD
5 HATCH
CARGO
WOOD BLKHD.
UPPER 'TWEEN DK.
COAL
WEATHER DECK
4 HOLD
CARGO
WOOD BLKHD.
WOOD BLKHD.
LOWER 'TWEEN DK.
COAL
3 HOLD
CARGO
WOOD FEEDER
3 HATCH
STEEL BLKHD.
STEEL, WOOD AT SIDES.
COAL
COAL
COAL
BOTTOM
TANK TOP
STEEL BLKHD.
FORE-ROOM
PROFILE PLAN - "M. GALILEO"
682-C



[fol. 683] LIBELLANTS' EXHIBIT 15

26 Aug. 29 AM 5 34.

WNY B G 1.
RADIO SS GALILEO G 11 RCA NEW YORK 32.

Wilsonlyn, New York:

Bunkers in NR 3 'tween deck on fire spreading to cargo NR 2 'tween deck fore part ship full of smoke have got powder on deck must have fire float urgent

Master.

(Phoned Muller Aug. 29 1:29 A.M.)

26 Aug. 29 AM 12 37.

WNY PT 34 RDO RUSH.
SS GALILEO G11 RCNY 16.

Wilsonlyn, New York:

Anchored Shakespeare Bay suggest sending gang off to discharge bunkers now on fire.

Master.

(M M no answer from calls.)
(Actually phoned at P.M. 10:58 August 28th to Muller, Asst. Supt., Hoboken, 7523.)

[fol. 684] 26 Aug. 28 PM 9 38.

WNY PT 31 RDO.
SS GALILEO G11 RCNY 26.

Wilsonlyn, New York:

Bunkers in NR three 'tween deck on fire returning New York arriving Ambrose lightship eight thirty suggest bunkers discharged or shifted to NR two shelter deck.

Master.

(Phoned Muller, Asst. Supt., at 10:58 P. M. Aug. 28th.)
(Hold on desk until Monday Phoned from Muller.)

LIBELLANTS' EXHIBIT 16

Lloyds Register of British & Foreign Shipping

Report by the Chief Engineer Surveyor on the Spontaneous Combustion of Coal

May, 1912

(Pages 16-17)

General Conclusions

After a careful consideration of the conclusions arrived at by the Royal Commissioners of 1875, and by Professor Threlfall, and of the experiments conducted by M. Fayol, it is considered that, without any doubt whatever, coal cargoes should not have any through ventilation, the very thorough ventilation suggested by M. Fayol, by dividing up the cargo into numerous separated layers being quite impracticable. Even if the division could be carried out, there would be great difficulty in arranging such through [fol. 685] currents of air as to ensure sufficient circulation through every place where there was an accumulation of small coal and dust to carry away the heat generated by the oxidation caused by the limited air supply.

The surface ventilation now always provided, if the cowls are properly attended to, is a safeguard against the accumulation above the coal of marsh gas or other inflammable gases evolved from the coal, and the consequent risk of explosion; but it is a question whether this ventilation, supplemented as it frequently is by the opening of the hatches in fine weather, does not aid in producing heating of the coal and the risk of spontaneous combustion, by supplying to the body of the coal the limited quantity of air necessary to permit of the slow absorption of oxygen, which is the cause of the heating of the coals. It would be safer as regards heating if M. Fayol's suggestion of hermetically sealing the holds could be carried out, arranging, however, provision for the escape of the marsh gas evolved during the voyage. If this method could be adopted care would have to be taken to thoroughly ventilate the surface and the vacant spaces in the holds before discharging the cargo. Also as the holds would soon become full

of gas in all the interstitial spaces between the pieces of coal, special attention would have to be given to prevent leakage of dangerous gas through sounding pipes, bilge and deck pump suction pipes, &c. The care necessary, however, would not be greater than that habitually given to such matters in the cases of vessels carrying petroleum in bulk.

From the report of Professor Threlfall, supplemented by the experiments of M. Fayol, it appears that the presence [fol. 686] of pyrites in the coal has not the prejudicial effect which the Royal Commissioners of 1875 supposed, and it is also clear from both these sources that wet or damp coal is not in any way more dangerous to carry than coal which is perfectly dry.

Concerning bunkers, the conditions regarding which are so different from those applying to holds, and in which, while they are being worked, it is necessary to have an ample ventilation throughout, it is desirable that the engineers of the vessels should realize the conditions tending to over-heating and combustion, so that in each particular case they may take such precautions as may be possible. Amongst other points they should understand—

1. That all coal gives off some inflammable gas when freshly worked, and also when freshly broken, and that this gas becomes explosive when mixed with certain proportions of air. It is the evolution of this gas which requires the ventilation of the bunkers before entering them with naked lights.

2. That heating of coal and the consequent risk of spontaneous combustion does not proceed from the presence of gas, but is caused by the absorption of oxygen from the air.

3. That this absorption, and the accompanying development of heat, is greater at high than at low temperatures, so that when once commenced it proceeds at an increasing rate if the supply of air is maintained.

[fol. 687] 4. That where heat is being generated by the absorption of oxygen it is probable that more gas will be evolved. The evolution of the gas, however, does not cause the generation of heat. Where such gas is being evolved, if sufficient supply of air is maintained to provide more

oxygen than is being absorbed, an explosive mixture is formed amongst the coal.

5. To minimise the absorption of oxygen by the coal in reserve bunkers, or in any bunker in which men are not actually working, the lower doors should be kept absolutely closed, so as to prevent any current of air whatever passing through the bunker and into the mass of coals.

6. If there are any parts of bunkers in which, owing to the proximity of boilers, uptakes, or recesses through which steam pipes, &c., are carried, there is likely to be a higher than normal temperature, these parts should, if possible, be stowed with large coal and should be worked out as soon as possible. The shoots should be arranged not to deliver small coal into these places.

7. Small coal which accumulates under shoots, &c., should be worked out as soon as possible and not left till the last.

8. If any coal is left in a bunker when a fresh charge has to be taken in, it should be trimmed into a position to ensure its being used on the next voyage. It cannot be too strongly impressed upon those responsible, that danger of [fol. 688] overheating and spontaneous combustion increases with the length of time the coal remains in the ship.

9. Where bunkers are over gutterways, &c., special care should be taken that the limbers are tight. Several fires have originated in bunkers just over the limbers, and there is reason to suppose that they have been caused by air circulating through the coal and coming from the limbers.

10. There is no risk entailed by the coal being wet when put on board. In fact, in cases where coal is known to be of a fiery nature, it would be of an advantage for the small coal to be damped when charging the bunkers.

11. If heating of any part should occur where there is no traceable external source of heat to account for it, the heating will probably be local only in a part where the coal is small, and the surrounding portions may not be overheated. In attempting to obtain access to the heated parts for the purpose of applying water, special care is needed to pre-

vent the action taken from supplying the air which is needed to convert a heated zone into an actual fire.

12. Although some kinds of coal have proved to be more liable to spontaneous heating and combustion than others, it should be realized that all coal, even anthracite, is liable to these occurrences.

[fol. 689] LIBELLANTS' EXHIBIT 17

For Official Use

Circular 1641

Board of Trade, Marine Department

December, 1922.

Instructions to Surveyors

Surface Ventilation of Coal Cargoes

(Pages 1, 2, 3)

The following instructions relating to the surface ventilation of holds and other compartments containing coal, and to the ventilation of spaces adjacent to such compartments, come into force 1st July, 1923. They differ from the instructions contained in Circular 1197, which they will supersede, chiefly in the following respects:—A new instruction (paragraph 5) has been inserted as to the arrangement and area of Ventilator Orifices. The height and thickness of ventilator coamings as fitted in new vessels, and also of coamings when requiring to be renewed in existing vessels, have been increased in accordance with the recommendations of the Loadline Committee (1915), and the arrangements for securing the coamings to the deck have been substantially improved. See paragraphs 8 and 9. The deck plating is required to be stiffened where necessary in the vicinity of the coamings as recommended by the same Committee. See paragraph 10. New provisions (paragraph 15) have been inserted as to the arrangements necessary [fol. 690] when passenger or crew spaces are situated on a deck forming the crown of a coal space.

1. Object of Instructions.—The object of these instructions is to secure that proper arrangements are made to prevent, as far as possible, explosions due to the accumulation of explosive gases which are always given off from coal in cargo holds and in bunkers.

2. Surface Ventilation to be Provided.—All holds, bunkers and other compartments of vessels in which coal is carried should be provided with an effective system of surface ventilation to ensure the free escape of the explosive gases given off by the coal.

3. Ventilation Into a Mass of Coal is Prohibited.—It should be carefully borne in mind that spontaneous combustion in coal cargoes is due to causes entirely distinct from the giving-off of gases referred to above. Spontaneous combustion is promoted by the introduction of air into a mass of coal, and for that reason Surveyors should not accept any arrangement of ventilators which would deliver air into the body of the coals stowed in any compartment.

4. Action of Surveyors.—The following instructions should be acted on by the Surveyors in future cases in which the surface ventilation of coal cargoes and bunker coal may be dealt with or in which it is considered necessary to order a coal-laden ship to be detained as unfit to proceed to sea without serious danger to human life, owing to insufficient surface ventilation of the cargo or owing to defective construction of the ventilators or their deck fittings.

[fol. 691] Surveyors should note that the requirements of paragraphs 8 and 9, regarding the construction of ventilator coamings, and of paragraph 10 regarding the stiffening of the deck, apply to new vessels the keels of which are laid on or after 1st July, 1923, but these requirements should also be substantially complied with when it is found necessary to renew ventilator coamings in an existing vessel.

The provisions of paragraph 5 (a) to (c) and the last clause of paragraph 12 are recommendations, but, in the case of passenger steamers coming under survey for the first time on or after 1st July, 1923, the arrangements for ventilating reserve bunkers should comply with paragraph 5 (a) to (c). See paragraph 13.

5. Arrangement and Area of Ventilator Orifices.—Each hold or 'tween deck compartment in which coal is carried should be provided with at least two ventilators, one for inlet and the other for outlet. They should be of about the same size and placed at the opposite ends of the compartment or as far apart as practicable. See paragraph 6 for types of ventilators.

As regards the provision of additional ventilation, the Surveyors cannot at present require any particular arrangement to be adopted, but the following suggestions as to number and area of ventilating orifices are formulated for the sake of uniformity, and no objection need be raised to arrangements which comply with them.

The suggestions apply to new vessels, the keels of which are laid on or after 1st July, 1923.

(a.) Where the breadth of the deck, forming the crown [fol. 692] of the hold or 'tween decks at either end of the space, is 45 ft. or more, measured to the inside of the shell plating, at least two ventilating orifices should be provided at that end of the compartment and they should be suitably disposed to ventilate the "wings" of the space.

(b.) Where the length of the compartment is 80 feet or more, one additional ventilating orifice should be provided near the middle of the compartment, if the breadth of the compartment at the middle is less than 45 feet, and two additional orifices if the breadth is 45 feet or more.

(c.) The aggregate clear area of the ventilating orifices for any hold should not be less than given by the following rule:

$$A = \frac{L \times B}{1000}$$

where A is the aggregate clear area of the openings in square feet;

L is the mean length of the hold in feet at the deck forming its crown; and

B is the breadth in feet of the deck forming the crown of the hold, measured at the middle of the hold to the inside of the shell plating.

The aggregate clear area of the ventilating orifies for any 'tween deck compartment should not be less than given by the following rule

$$A = \frac{L \times B}{1500}$$

the length L and the breadth B being in this case measured at the deck forming the crown of the 'tween decks compartment.

[fol. 693] LIBELLANTS' EXHIBIT 18

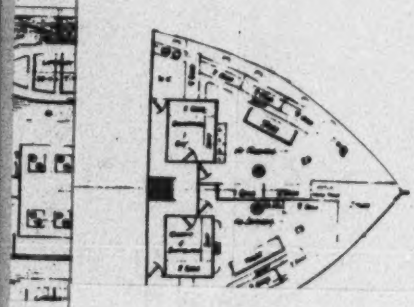
(Photoprint)

(Here follows side folio 693-a)

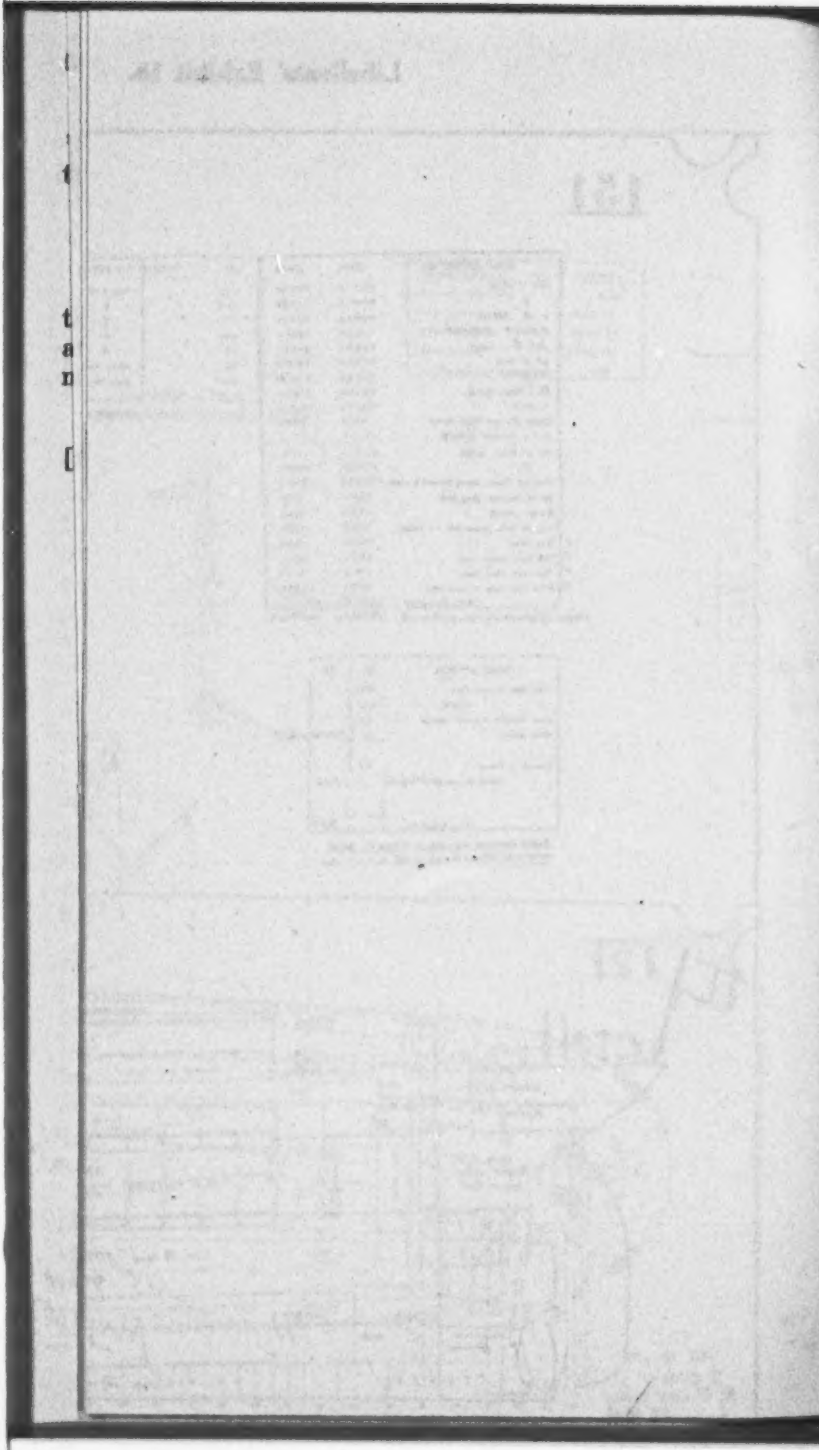
FOLD OUT IS TOO LARGE TO BE FILMED

554A

151



— DIAGRAM SCALE —



[fol. 694] LIBELLANTS' EXHIBIT 19

(Omitted pursuant to stipulation)

LIBELLANTS' EXHIBIT 20

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

100—34

CUDAHY BROS. Co. et als., Libellants,

against

ELLERMAN'S WILSON LINE, LTD., Owner of S. S. "Galileo", Respondent

96—206

EARLE & STODDART, INC., et als., Libellants,

against

ELLERMAN'S WILSON LINE, LTD., Owner of S. S. "Galileo", Respondent

Stipulation as to Certain Facts

It is hereby stipulated and agreed by and between the [fol. 695] parties hereto that the following facts are true and need not be established by the introduction of evidence:

1. All the libellants are individuals, partnerships or corporations, as alleged in the first paragraph of the libels.

2. The statement in the libels of the merchandise shipped on the S. S. "Galileo" is correct excepting that the following discrepancies should be and are hereby corrected:

Item				
14	5 Boxes	Should be	8 Boxes.
37	6 "	"	" 7 "
83	3 "	"	" 5 "
119	Newcastle	"	" Hull.
120	"	"	" "
153	28 Boxes	"	" 65 Boxes.
180	Newcastle	"	" Hull.
184	186 Boxes	"	" 23 Boxes.

Item		
190	Apparently duplicate of 189.	
191	Newcastle	Should be Hull.
219	500 Boxes	" " 499 Boxes.
230	290 Cases—In excess—apparently duplicated.	

3. All of the merchandise shipped on the S. S. "Galileo" on the voyage mentioned in the libels sustained some damage from fire occurring on board said steamer and/or water resulting from an effort to put out the fire.

4. The parties hereby agree that the trial on the merits may be proceeded with without the necessity of the libellants proving the actual ownership and right to sue in each instance at the trial.

[fol. 696] 5. The following chemical analysis of both Pocahontas and Morrisdale Coal, as taken from the mine vein, is correct. This Morrisdale coal sample was taken from the same vein that produced the coal sold to the "Galileo".

	Fixed carbon	Volatile matter	Moisture	Sulphur	Ash	Oxygen
New River or Pocahontas Coal	74.16	18.15	2.57	1.26	5.12	4.69
Morrisdale Coal	65.6	24.3	2.4	2.1	7.7	5.0

6. All of the coal which was on board the "Galileo" on the voyage mentioned in the libels was run-of-the-mine Morrisdale Coal.

Dated New York City, November 1, 1929.

Bigham, Englar, Jones & Houston, Proctors for Libellants. Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Respondent.

96
206

Ex. #21
U. S. Dist. Court,
S. D. of N. Y.
NOV 8 '29.

(Ellison)

[fol. 697] LIBELLANTS' EXHIBIT 21

(Photoprint, side folio 697-a)

[fol. 698] LIBELLANTS' EXHIBIT 22

(Photoprint, side folio 698-a)

FOLD OUT IS TOO LARGE TO BE FILMED

Libellants' Exhibit 22.

B RC3 5028

Ellerman's Wilson Line

ELLERMAN'S WILSON LINE, LIMITED, HULL,
OWNERS:

NEW YORK to HULL.

CARRYING GOODS AT THROUGH RATES TO AND FROM
Newcastle-on-Tyne, Lynn, Ipswich, Yarmouth,
Sunday, Aberdeen, Leith, Etc.

26, BROADWAY,
NEW YORK, N.Y.

CHAMBER OF COMMERCE BLDG.,
BOSTON.

FORWARDING CLAUSE:—Applying only if the whole goods are contracted for delivery [illegible].
THE GOODS SPECIFIED IN THIS BILL of LADING are to be forwarded to

[illegible] unless the owner's risk notes where same are required by carrier by which the goods are forwarded. In event of the usual terms of conveyance from Hull to the place of destination, and the delivery of the goods thereat being delayed, recorded, interrupted or rendered impossible, the Steamship Company may in its sole discretion and option, forward the goods to the nearest available place, there to be considered a final delivery, or may retain or warehouse the goods. The charges and expenses consequent thereupon, and any other charges incurred by the Steamship Company in addition to such ordinary expenses of carriage and transhipment shall be paid by the consignee, and the Steamship Company may exercise a lien on the goods until such expenses are paid.

SHIPPERS' MARKS:

R B
9103
HULL

Ex. 224.
U. S. Dist. Court,
S. D. of N. Y.
NOV 11 29

NOTIFY..RUSTON & HORNSBY LTD
EXCAVATOR WORKS
SPIKE ISLAND
LINCOLN

NOTIFICATION CLAUSE. Also on each such [illegible] consignment whatsoever attach to the steamer or her owners, her [illegible] to timely forwarding of arrival of goods.

..... @ ..... per ..... $..... ¢.....
..... Ft. ..... in. @ ..... per c. ft. $.....
..... @ ..... per 2240 lbs. $.....
..... @ ..... per ..... lbs. $.....

Total $.....

RECEIVED

8 EIGHT PIECE

IT IS MUTUALLY

ALL RISK OF FIRE OR FLOOD WHILE GOODS ARE ON THE DOCK TO BE BORNE BY SHIPPERS.

Attention of Shippers is called to Sec. 2(3) of the Criminal Code of the United States (Act of Congress, March 4th, 1909).

N.Y. 24—10,000—6-24—HY

FOLD OUT IS TOO LARGE TO BE FILMED

1-2-10M-10/M-7-26

PAYABLE IN GOLD OR ITS EQUIVALENT

UNITED STATES STEEL PRODUCTS COMPANY

LONDON

T

POST OFFICE ADDRESS: 30 CHURCH STREET, NEW YORK CITY

EXPORTERS OF THE PRODUCTS OF

CARNEGIE STEEL CO.	AMERICAN STEEL & WIRE CO.	AMERICAN SHEET & TIN PLATE CO.	NATIONAL TUBE CO.
ILLINOIS STEEL CO.	AMERICAN BRIDGE CO.	TENNESSEE COAL IRON & R. R. CO.	LORAIN STEEL CO.

ALL INVOICES ARE SUBJECT TO DRAFT OR CASH AGAINST DOCUMENTS, ACCORDING TO ARRANGEMENT.
NO GOODS SOLD OR SHIPMENTS MADE SUBJECT TO ACCEPTANCE OR INSPECTION. AFTER LEAVING THE MAKERS MILLS.
CLEAN BILLS OF LADING CONSTITUTE OUR FINAL DELIVERY AND RELEASE FROM RESPONSIBILITY.
OUR RATES ARE BASED ON INVOICE DATES.

LONDON OFFICE, 36-38 NEW BROAD ST. E.C.

REFER TO [illegible] NO. 112511

NEW YORK, Aug. 20 1926.

SOLD TO RUSTON & HORNSBY LTD., LINCOLN, ENGLAND.

Eu-1 - 190

FOR SHIPMENT FROM PITTSBURGH, PA. TO HULL ENGLAND PER ABOUT

INSURANCE VIA NEW YORK EFFECTED WITH THE SEA INSURANCE CO FOR $ 600.00

PRICES C.I.F-HULL, ENGLAND. TERMS NET CASH SIGHT DRAFT WITH SHIPPING DOCUMENTS ATTACHED ON MESSRS. RUSTON & HORNSBY LTD., LINCOLN, ENGLAND.

MILL NO. U-X-214

OUR ORDER 9103 SALESMAN LONDON-- TL-6384 NO. N. Y. NO. XCS-5028

	PCS		WEIGHT EACH	TOTAL WEIGHT T.	C.	Q.	PRICE PER 2240 LBS. OVERHEAD. £	S	D
		TANK STEEL PLATES							

Libellants' Exhibit 23.

[fol. 699] LIBELLANTS' EXHIBIT 23

(Photoprint, side folio 699-a)

[fol. 700] LIBELLANTS' EXHIBIT 24

(Photoprint, side folio 700-a)

Holds

96/206

1 Gram
2 ✓
3 ✓
4 Acc
5 Gram
6 ✓

Decks

1 Pmen.
2 Yeoman
3 ✓
4 Pmen
5 Boom
6 Pmen.

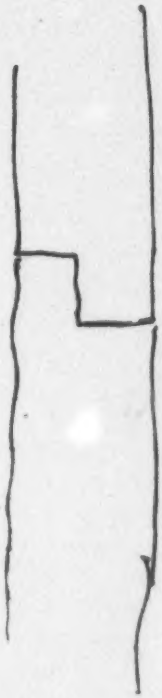
(Hands)

Ex. 424.
U. S. Dist. Court,
S. D. of N. Y.
NOV 21 '29

96/206

Ex. 25
U. S. Dist. Court,
S. D. of N. Y.
NOV 11 '29.

(Hook!)



[fol. 701] LIBELLANTS' EXHIBIT 25

(Photoprint, side folio 701-a)

[fol. 702] LIBELLANTS' EXHIBIT 26

Lloyd's Calendar, 1926

Fires in Bunkers and Coal Cargoes

Risks of Spontaneous Combustion

(Pages 267-269)

A report, made to the Committee of Lloyd's Register, by Mr. J. T. Milton, the Society's Chief Engineer Surveyor, on the subject of spontaneous combustion of coal, was issued in July, 1912. It is noted that during 1911 no fewer than 103 cases were reported in the Shipping Gazette and Lloyd's List of vessels arriving at or being in port with bunkers on fire, and 24 cases of vessels reported with cargoes on fire. The "general conclusions" of the report are as follows:

Through Ventilation.—After a careful consideration of the conclusions arrived at by the Royal Commissioners of 1875, and by Professor Threlfall, and of the experiments conducted by M. Fayol, it is considered that, without any doubt whatever, coal cargoes should not have any through ventilation, the very thorough ventilation suggested by M. Fayol, by dividing up the cargo into numerous separated layers, being quite impracticable. Even if the division could be carried out, there would be great difficulty in arranging such through currents of air as to ensure sufficient circulation through every place where there was an accumulation of small coal and dust to carry away the heat generated by the oxidation caused by the limited air supply.

Hermetically Sealed Holds.—The surface ventilation now [fol. 703] always provided, if the cowls are properly attended to, is a safeguard against the accumulation above the coal of marsh gas or other inflammable gases evolved from the coal, and the consequent risk of explosion; but it is a question whether this ventilation, supplemented as it frequently is by the opening of the hatches in fine weather, does not aid in producing heating of the coal and the risk of spontaneous combustion, by supplying to the body of the coal the limited quantity of air necessary to permit of the slow absorption of oxygen, which is the cause of the heating

of the coals. It would be safer as regards heating if M. Fayol's suggestion of hermetically sealing the holds could be carried out, arranging, however, provision for the escape of the marsh gas evolved during the voyage. If this method could be adopted care would have to be taken to thoroughly ventilate the surface and the vacant spaces in the holds before discharging the cargo. Also as the holds would soon become full of gas in all the interstitial spaces between the pieces of coal, special attention would have to be given to prevent leakage of dangerous gas through sounding pipes, bilge and deck pump suction pipes, &c. The care necessary, however, would not be greater than that habitually given to such matters in the cases of vessels carrying petroleum in bulk.

Pyrites and Wet Coal.—From the report by Professor Threlfall, supplemented by the experiments of M. Fayol, it [fol. 704] appears that the presence of pyrites in the coal has not the prejudicial effect which the Royal Commissioners of 1875 supposed, and it is also clear from both these sources that wet or damp coal is not in any way more dangerous to carry than coal which is perfectly dry.

Bunker Risks.—Concerning bunkers, the conditions regarding which are so different from those applying to holds, and in which, while they are being worked, it is necessary to have an ample ventilation throughout, it is desirable that the engineers of the vessels should realise the conditions tending to over-heating and combustion, so that in each particular case they may take such precautions as may be possible. Amongst other points they should understand—

1. That all coal gives off some inflammable gas when freshly worked, and also when freshly broken, and that this gas becomes explosive when mixed with certain proportions of air. It is the evolution of this gas which requires the ventilation of the bunkers before entering them with naked lights.

2. That heating of coal and the consequent risk of spontaneous combustion does not proceed from the presence of gas, but is caused by the absorption of oxygen from the air.

3. That this absorption, and the accompanying development of heat, is greater at high than at low temperatures,

so that when once commenced it proceeds at an increasing rate if the supply of air is maintained.

[fol. 705] 4. That where heat is being generated by the absorption of oxygen, it is probable that more gas will be evolved. The evolution of the gas, however, does not cause the generation of heat. Where such gas is being evolved, if sufficient supply of air is maintained to provide more oxygen than is being absorbed, an explosive mixture is formed amongst the coals.

5. To minimise the absorption of oxygen by the coal in reserve bunkers, or in any bunker in which men are not actually working, the lower doors should be kept absolutely closed, so as to prevent any current of air whatever passing through the bunker and into the mass of coals.

6. If there are any parts of bunkers in which, owing to the proximity of boilers, uptakes, or recesses through which steam pipes, &c., are carried, there is likely to be a higher than normal temperature, these parts should, if possible, be stowed with large coal, and should be worked out as soon as possible. The shoots should be arranged not to deliver small coal into these places.

7. Small coal which accumulates under shoots, &c., should be worked out as soon as possible, and not left till the last.

8. If any coal is left in a bunker when a fresh charge has to be taken in, it should be trimmed into a position to insure its being used on the next voyage. It cannot be too strongly impressed upon those responsible that danger of over-[fol. 706] heating and spontaneous combustion increases with the length of time the coal remains in the ship.

9. Where bunkers are over gutterways, &c., special care should be taken that the limbers are tight. Several fires have originated in bunkers just over the limbers, and there is reason to suppose that they have been caused by air circulating through the coal and coming from the limbers.

10. There is no risk entailed by the coal being wet when put on board. In fact, in cases where coal is known to be of a fiery nature, it would be of an advantage for the small coal to be damped when charging the bunkers.

11. If heating of any part should occur where there is no traceable external source of heat to account for it, the heat-

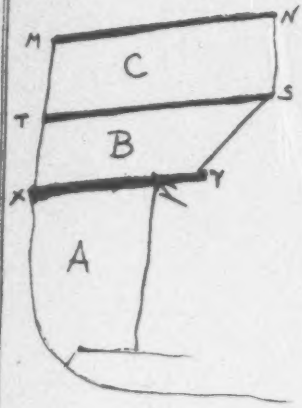
ing will probably be local only in a part where the coal is small, and the surrounding portions may not be overheated. In attempting to obtain access to the heated parts for the purpose of applying water, special care is needed to prevent the action taken from supplying the air which is needed to convert a heated zone into an actual fire.

12. Although some kinds of coal have proved to be more liable to spontaneous heating and combustion than others, it should be realized that all coal, even anthracite, is liable to these occurrences.

[fol. 707] LIBELLANTS' EXHIBIT 27

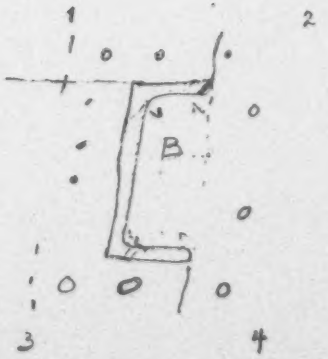
(Photoprint, side folio 707-a)

96
206



Ex. #27
U. S. Dist. Court,
S. D. of N. Y.
NOV 13 '29.

(Laurie)



[fol. 708] LIBELLANTS' EXHIBIT 28

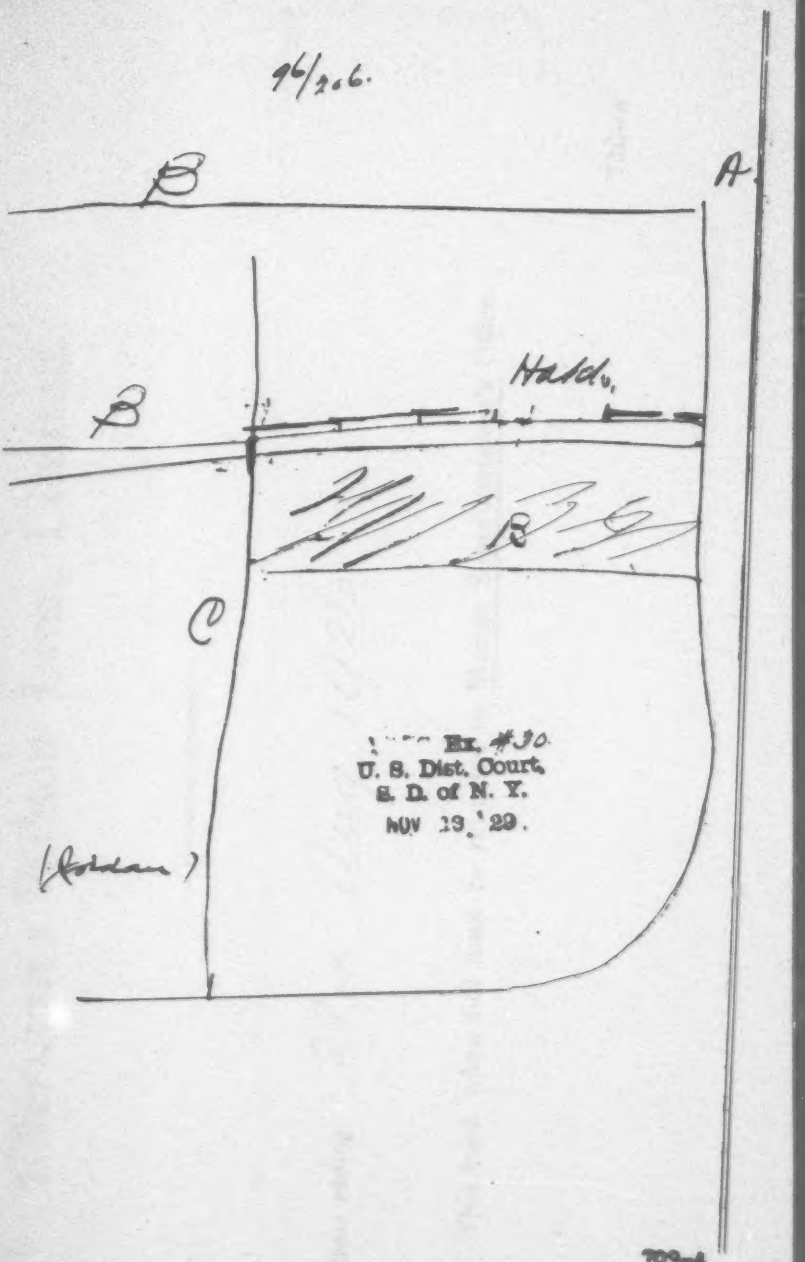
(Omitted pursuant to stipulation)

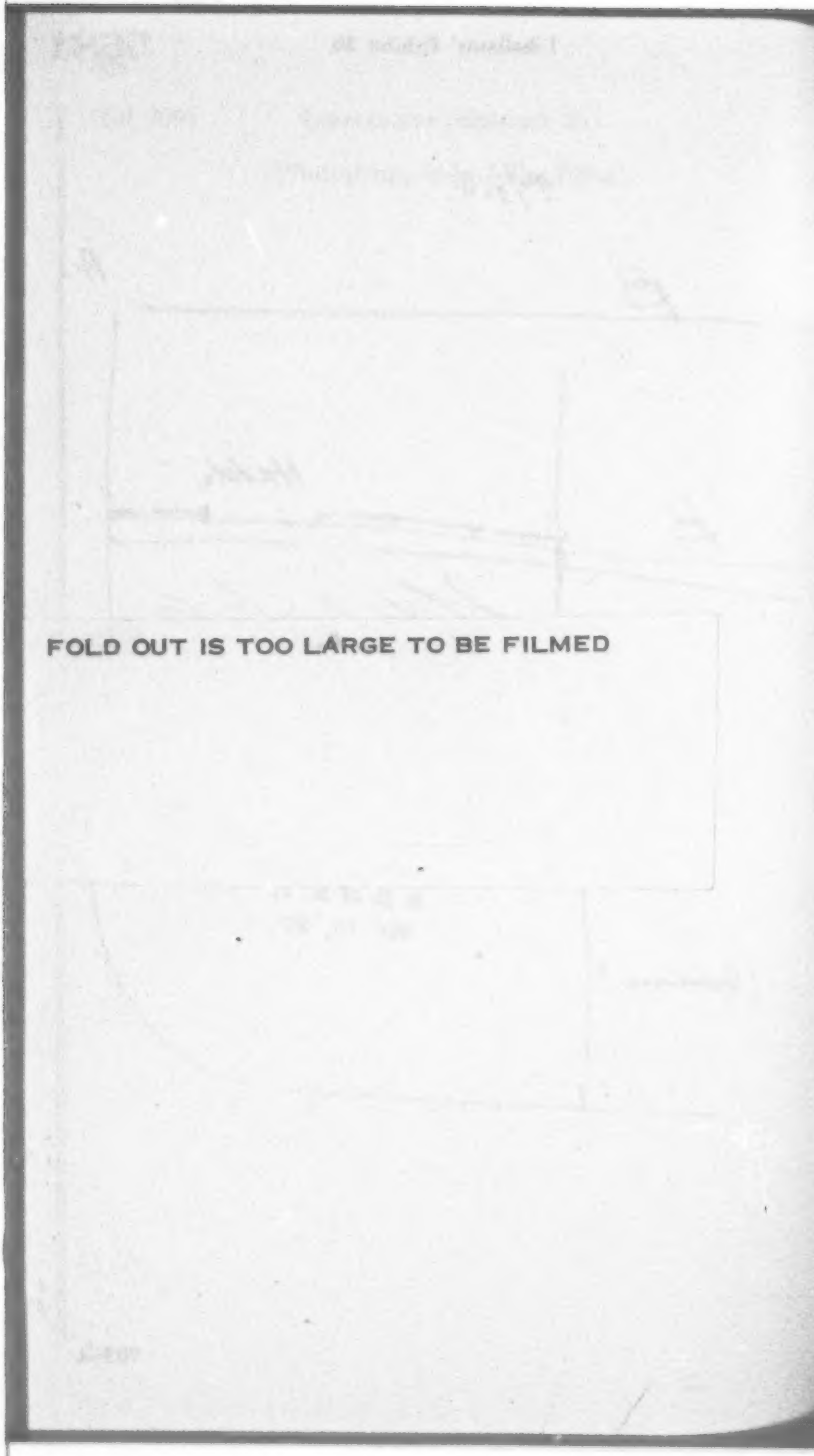
LIBELLANTS' EXHIBIT 29

(Printed herein at page 724 as Respondent's Exhibit 29)

[fol. 709] LIBELLANTS' EXHIBIT 30

(Photoprint, side folio 709-a)


96/206.
B
A
B
Hold
B
C
Ex. #30
U. S. Dist. Court
S. D. of N. Y.
NOV 19 '29.
(Holden)



FOLD OUT IS TOO LARGE TO BE FILMED

Ellerman's Wilson Line, Limited.

Respondent's Exhibit A.

Mate's Log Book

Containing

A Record of the Proceedings on board the

S.S. "Galileo"

Commanded by C. Barron

FOLD OUT IS TOO LARGE TO BE FILMED

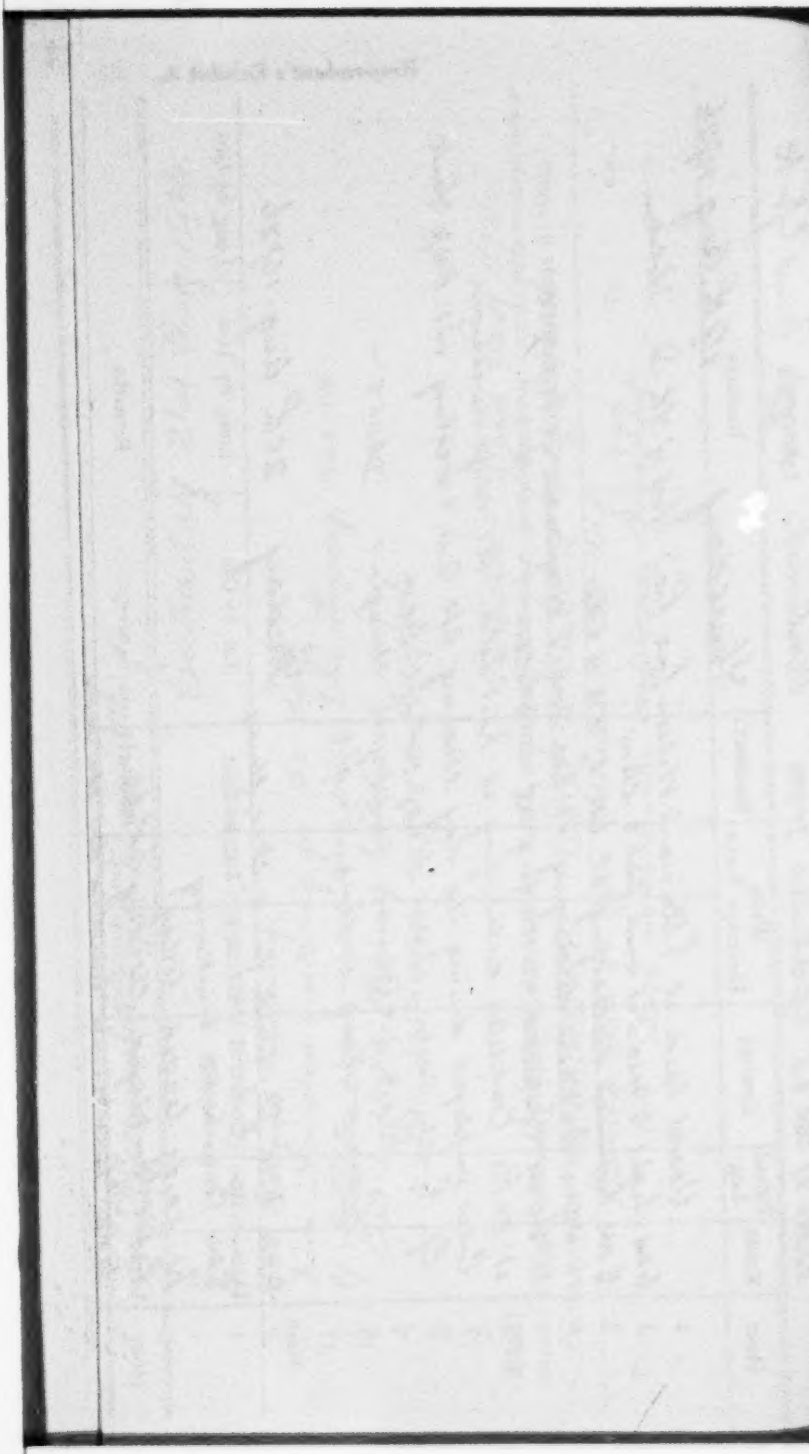
LOG of the s.s. "Galileo" from Antwerp towards New York.

Hour	Knots	Patent Log	Courses	Wind Direction	Wind Force	Barometer	Remarks
							Thursday 19th Aug 1926.
1			Vessel laid at Ellerman's Wilson Line Pier, Foot of 4th St., Hoboken.				
2	6 AM.		Light to mod. SE wind, fine & clear.				
3	8 AM.		Resumed discharging at hos. 1, 2 & 5 holds.				
4	10:45 AM.		Completed discharging at hos. 2 & 5 & commenced at ho. 6 hold.				
5	11:40 AM.		Completed discharging at ho 6 hold.				
6	12:30 PM.		Completed discharging at ho 1 hold. all cargo discharged.				
7			Crew employed during the day cleaning aft C.D. & washing out Deep Tank.				
8			G. Gill, Sailor, absent today without leave				
9			Shore watchman employed throughout DRAFT:-				
10			Crew working overtime tonight.				
11							
Noon							Friday 20th Aug 1926.
	6 AM. Mod. SE wind fine & clear, cloudy						

Distance Run	Corrected	Variation	Lat. by Acct.	Lat. by Obs.	Long. by Acct.	Long. by Obs.
8 AM. Commenced hatchening the cargo loaded today						

Hour	Knots	Patent Log	Courses	Wind Direction	Wind Force	Barometer	Remarks
1			5 PM. Hatchening finished for the day Shore watchman employed throughout				

Respondent's Exhibit A.



[fol. 710] RESPONDENT'S EXHIBIT A

(Part Photoprinted, side folios 710-a and 710-b)

[fol. 711] RESPONDENT'S EXHIBIT B

(Photoprint, side folios 711a, b, c, d, e, and f)

FOLD OUT IS TOO LARGE TO BE FILMED

Ellerman's Wilson Line, Limited.

Respondent

Date ending _____

This book when full must be returned to Marine Superintendent's Office.

711-A

2-A

FOLD OUT IS TOO LARGE TO BE FILMED

LOG of the s.s. "Galileo" from Antwerp AT towards New York.

Hour	Knots	Patent Log	Courses	WIND Direction	WIND Force	Barometr	Monday	Remarks 23rd. Aug. 1926.
"	Light E'ly wind, dull & ocast, continuous rain.						"	"
"	" Crew variously employed during the day.						"	"
"	" Shore watchman employed throughout.						"	"
"	" Watson, Sailor, absent without leave today, deserted						"	Noon
"	"						"	p.m.
"	"						"	"
"	"						"	"
"	"						"	"
"	"						"	"
"	"						"	Midnight

711-B

5208

P-4

FOLD OUT IS TOO LARGE TO BE FILMED

LOG of the s.s. "Falaba" from Antwerp AT towards New York.

Hour	Knots	Patent Log	Courses	WIND Direction	WIND Force	Barometr	Remarks
						Thursday	26th. Aug. 1926.
1	Vessel	laid	alongside	Ellerman's	Wilson	Line	Pier, foot of 4th St, Hoboken.
"	"						
"	"						
"	"					

FOLD OUT IS TOO LARGE TO BE FILMED

LOG of the s.s. Galilee from New York. towards Hull.

Hour	Knots	Patent Log	Courses	Wind Direction	Wind Force	Barometer	Remarks Saturday 28th. Aug 1926.
1		Vessel	laid alongside	Ellerman's Wilson Line Pier,			Hoboken.
2		6 AM.	Light NW wind, fine & clear.				
3		8 AM.	Resumed loading at No. 2 hold				CARGO.
4		9.15	Completed loading			30.5.	DRAFT. F. 26' 0" A 26' 8" 4/4/3 Newcastle
"		"					" " "
"		"					" " "
"		"					" " "
"		"					" Sunset "
" 10		" Noon.				J. McKee	" " Noon
" Noon		" 2 PM	R. Turner			J. Colledge	" " to p.m.
" 2 PM		" 4 "	"			W. Casey	" " "
" 4 "		" 6 "	T. Ellison.			A. Farrow	" Sunrise
" 6 "		" 8 "	"	W Casey		J. Maguire	" " "
" 8 "		" 10 "	S. Butcher			A. Farrow	" " "
" 10 "		" Midt.	"				" " Midnight

711-D

2-A

FOLD OUT IS TOO LARGE TO BE FILMED

LOG of the s.s. "Galileo" from New York towards Hull.

	Patent	Course	Wind	Remarks
"	"			
"	"			
"	"			
"	"			
"	"			
"	"			
"	"			
"	"			
"	"			
"	"			

AFT. " 40 feet. " to Sea. "
" " "
" " Noon
" " p.m.
" " "
" " "
" " "
" " "
" " Midnight

711-E

570E

2-A

FOLD OUT IS TOO LARGE TO BE FILMED

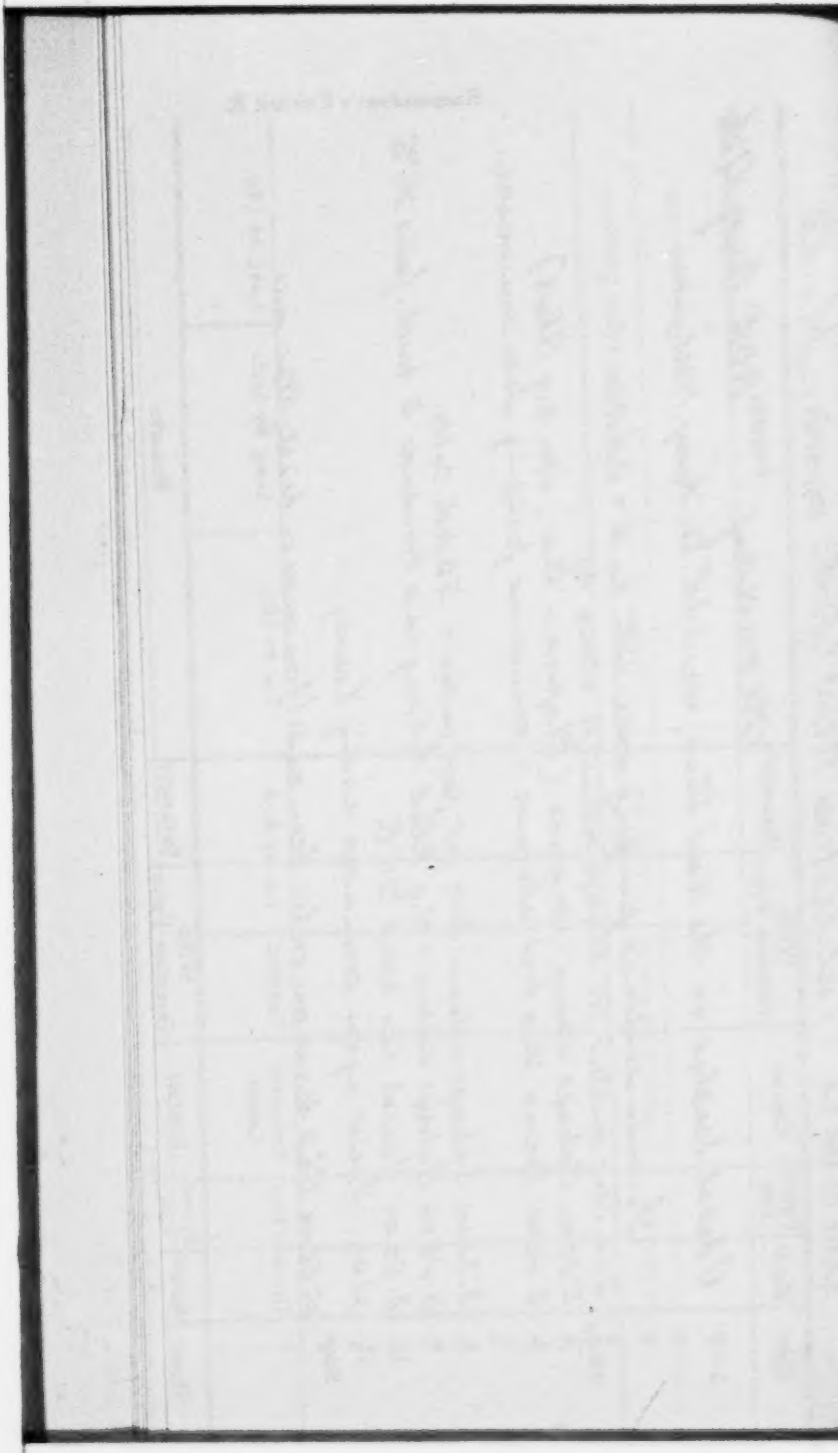
LOG of the s.s. Galileo **from.** New York **towards** Hull.

Hour	Knots	Patent Log	Courses	WIND Direction	WIND Force	Baromet'r	Monday	Remarks	30th. Aug 1926.
"	"							"	"
"	"							"	"
"	"							"	"
"	"							"	Noon
"	"							"	p.m.
"	"							"	"
"	"							"	"
"	"							"	"
"	"							"	"
"	"							"	Midnight

711-F

5701

2-A



COMMERCIAL CABLES

IN CONNECTION WITH POSTAL TELEGRAPH

CLARENCE H. MACKAY, PRESIDENT

RECEIVED AT
20 BROAD STREET
TEL. HANOVER 1120

STANDARD TIME

23 10 19 AM 26

DXDW YP58

HULIA~

LCO WILSONLYKE NY

BUNKER GALILEO ROUND VOYAGE

JUN 23 1926

Ex. C
U. S. Dist. Court,
S. D. of N. Y.
NOV 8 '29.

712-A

Respondent's Exhibit C.

570G

[fol. 712] RESPONDENT'S EXHIBIT C

(Photoprint, side folio 712-a)

[fol. 713] RESPONDENT'S EXHIBIT D

(Photoprint, side folio 713-a)

COMMERCIAL CABLES

IN CONNECTION WITH POSTAL TELEGRAPH

RECEIVED AT
20 BROAD STREET
TEL. HANOVER 1140

CLARENCE H. MACKAY, PRESIDENT.

538

GU RA YP28
HULL 9
LCO WILSONLYN NY

AUG 20 1926

GALILEO LOAD EIGHTFIFTY BUNKERS TRANSFERENCE FRANCISCO

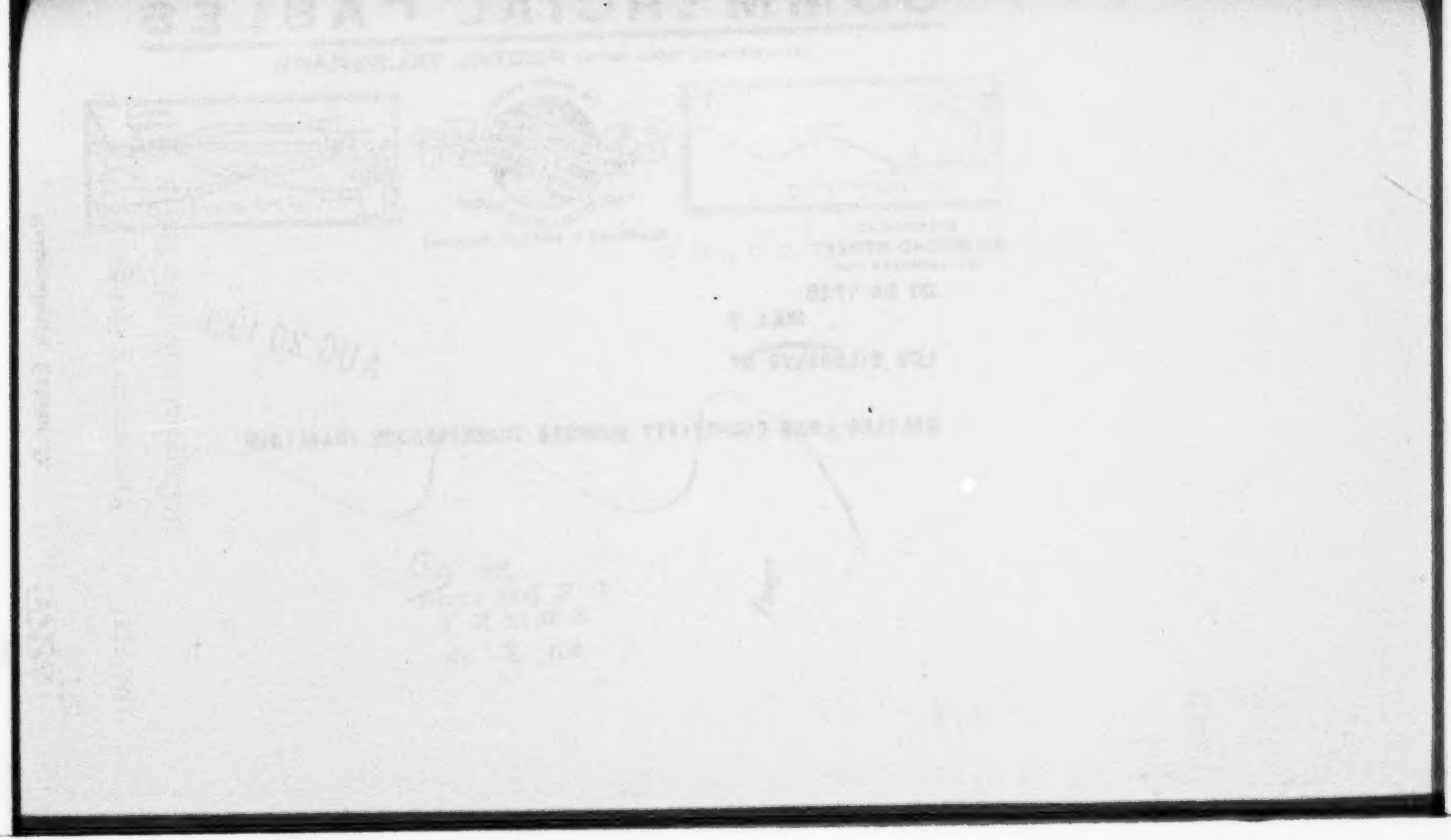
Ex.
U. S. Dist. Court
S. D. of N. Y.
NOV. 8 '29

169

713-A

Respondent's Exhibit D.

5724



MEMORANDUM.

FROM

ELLERMAN'S WILSON LINE NEW YORK, Inc.

PIER, FOOT OF 7TH STREET, HOBOKEN, N.J

N.Y 100—8,000—10/24—E.V.

To GALILEO

July - 26 1926

96/206 Coal on hand on arrival 594-16.
Coal loaded on board 1275-0.
Coal shifted to bunkers Nil.
Coal remained 59-0.
Coal on board leaving Ly. 1810-16.

Ex. "E"
U. S. Dist. Court
S. D. of N. Y.
NOV 11 - 29.

J. L. Oxleby. Chief Engineer

714-A

Respondent's Exhibit E.

5728

[fol. 714] RESPONDENT'S EXHIBIT E

(Photoprint, side folio 714-a)

[fol. 715] RESPONDENT'S EXHIBIT F

(Photoprint, side folio 715-a)

MEMORANDUM.

FROM

ELLERMAN'S WILSON LINE NEW YORK, Inc.

PIER, FOOT OF 7TH STREET, HOBOKEN, N.J

N.Y 100—5,000—10/24—S.W.

To GALILEO

Barge 107

AUG 28 1926. 192

	Tons.
Coal on board on arrival	430
Coal loaded on board	1332
Coal shifted to bunkers	Nil
Coal consumed	54.
Coal on board leaving Lig	1405.

96/206

J. L. Oxtoby. Chief Engineer

Ex. F
U. S. Dist. Court,
S. D. of N. Y.
NOV 11 '29.

715-A

Respondent's Exhibit F.

3748

Respondent's Exhibit G.

5748

TELEPHONE CENTRAL 2180 (20 LINES) CODES SCOTT'S, WATKINS & A.B.C. TELEGRAMS "WILSONS HULL"

ELLERMAN'S WILSON LINE, LIMITED.

Steamship Owners, Underwriters, Warehousemen,
Lighter Owners, Forwarding, Steamship
and Bunkering Agents,
Hull.

October, 1925.

IN YOUR REPLY PLEASE QUOTE THIS REFERENCE

ENGINEERING DEPT.

96/226

Chief Engineer,

S.S. _____

Ex. 4
U. S. Dist. Court,
S. D. of N. Y.
NOV '29.

Dear Sir,

Will you please note all Bunker Coal must be worked out of every bunker consecutively so that no coal will be left in the bunkers any length of time. Also as each bunker is emptied it must be swept down, and all small coal and dross removed and burnt.

Your attention is particularly drawn to this matter on account of recurring fires taking place in the Bunkers on various steamers, due to the fact that coal has been left too long in the bunkers, and has fired by spontaneous combustion.

At the end of this year, and each succeeding year, please send in a statement as to the longest time that any coal has been on board at the time of writing. also the amount.

Yours truly,

W. P. BRACKENBURY.

Superintending Engineer

716-A

[fol. 716] RESPONDENT'S EXHIBIT G

(Photoprint, side folio 716-a)

[fol. 717] RESPONDENT'S EXHIBIT H

(Omitted pursuant to stipulation)

[fol. 718] RESPONDENT'S EXHIBIT I

(Photoprint, side folio 718-a)

FOLD OUT IS TOO LARGE TO BE FILMED

Ellerman's Wilson Line of Steamers

Water taken from Pier through Meter 8700 c. ft.

Number of Passengers

Amount of Passage Money

Cause of Night Work on Inward Cargo To Dispatch Steamer

Cause of Night Work on Outward Cargo

Cause of Night Work Coaling

Remarks

Ellerman Wilson Line Ltd
Hull

Ex. "J"
U. S. Dist. Court,
S. D. of N. Y.
NOV 11 "29.

Agents

718-A

576A

FOLD OUT IS TOO LARGE TO BE FILMED

Water taken from Pier through Meter 8000 c. ft.

Number of Passengers

Amount of Passage Money

Cause of Night Work on Inward Cargo

Cause of Night Work on Outward Cargo } To Despatch Steamer

Cause of Night Work Coaling

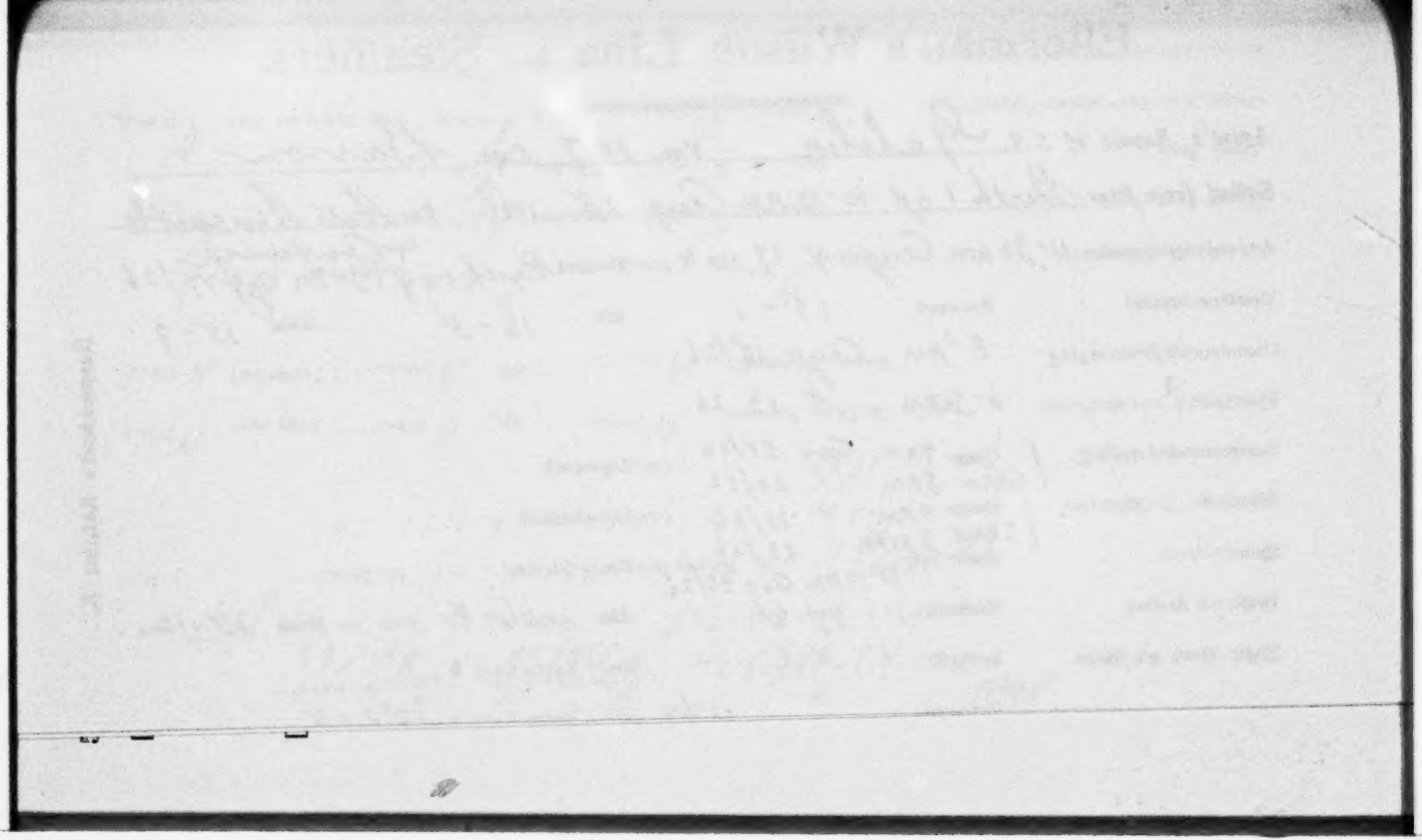
Remarks Allerman Welson Line Ltd
Hull

Exhibit 'K'
U. S. Dist. Court,
S. D. of N. Y.
NOV 11 '29.

Agents

720-A

5763



[fol. 719] RESPONDENT'S EXHIBIT J

(Omitted pursuant to stipulation)

[fol. 720] RESPONDENT'S EXHIBIT K

(Photoprint, side folio 720-a)

[fol. 721] RESPONDENT'S EXHIBIT L

(Omitted pursuant to stipulation)

[fol. 722] RESPONDENT'S EXHIBIT M

(Photoprint, side folio 722-a)

No. 254

CERTIFICATE OF LOADING
BUREAU OF INSPECTION
—OF—
The Board of Underwriters of New York.

96/206

New York, August 28, 1926.

This is to Certify. That the British S/S "GALILEO" whereof Barron is Master, of 4,091 Tons Measurement, built at Newcastle in 1908, bound for Hull has been under this inspection at this port during loading, and has conformed to all the Rules of The Board of Underwriters of New York in relation thereto.

GRAIN HOLDS INSPECTED AND PASSED AS PER PASSES

PARTICULARS OF CARGO LADEN.

Cargo consists of 144,217 bushels wheat in bulk, balance general cargo.
(86 cases gun powder to be loaded in Bay)

Ex. "24"
U. S. Dist. Court,
S. D. of N. Y.
NOV 14 '29

Total 144,217 Bush., equal to 3,863 Tons.

Draft of water loaded, 25 ft. -- in. forward, 26 ft. 8 in. aft. Freeboard, 13 ft. 7 in.

MEAN DRAFT 25 ft. 10 in.

H. A. Hyde Surveyor.

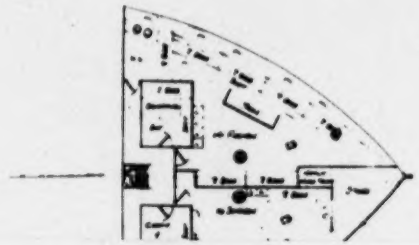
This Certificate is issued on the conditions that while the officers and Committees of the Board use their endeavors to insure that the functions of the Board are properly executed, neither such officers nor such Committees, nor the Board are under any circumstances whatever to be held responsible for any inaccuracy in any report or certificate issued by the Board or its surveyors, or for any error of judgment, default, or negligence of its surveyors or other employees or representatives of the Board.

722-A

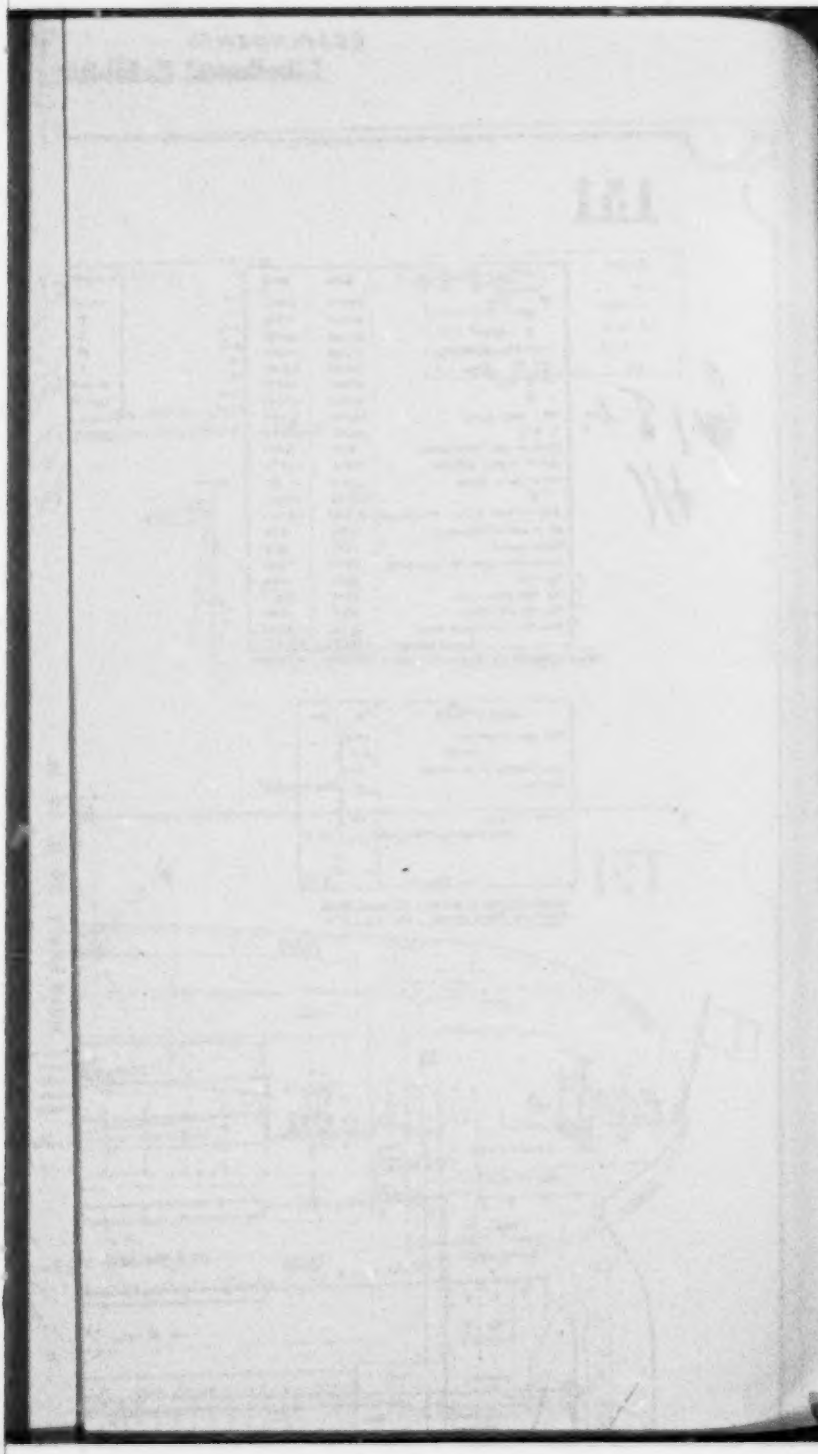
Respondent's Exhibit M.

5784

151



FOLD OUT IS TOO LARGE TO BE FILMED



[fol. 723] RESPONDENT'S EXHIBIT 18-B

(Photoprint, side folio 723-a)

[fol. 724] RESPONDENT'S EXHIBIT 29

(Photoprint, side folios 724-a, b, and c)

FOLD OUT IS TOO LARGE TO BE FILMED

...gines and Boilers, Repairs, &c,
...ome and Abroad.

...parts of the Engines or Boilers, please give below a short ...e found, and what was done to them and whether requiring ...eviations, G for good, M for middling, B for bad.

...e Engineer should submit a report of repairs necessary for ...en up such parts of the machinery as will require attention. ...irs are needed, a Supplementary indent must be submitted. ...nstructions for repairs to be done without having first obtained ...ons nor repairs, other than the making good of damage ...done in a foreign port.

...epairs and overhauling of Engines and Boilers as they are ... repairs are being done, they should exercise an intelligent ... and when possible, see all closed up and try the Engines ... sailing. Before sailing, the Chief Engineer should report ...'s office, and give a complete account of repairs done, and ... any repairs done abroad should be forwarded to Engineer's

...nselves that the time notes and other documents, such as ..., or coals, &c., are correct before they sign them ; and any ...e, so that the matter may be enquired into before the ship

...side, note opposite days when lying in port particulars of

FOLD OUT IS TOO LARGE TO BE FILMED

on of Boilers and Machinery.

Homeward

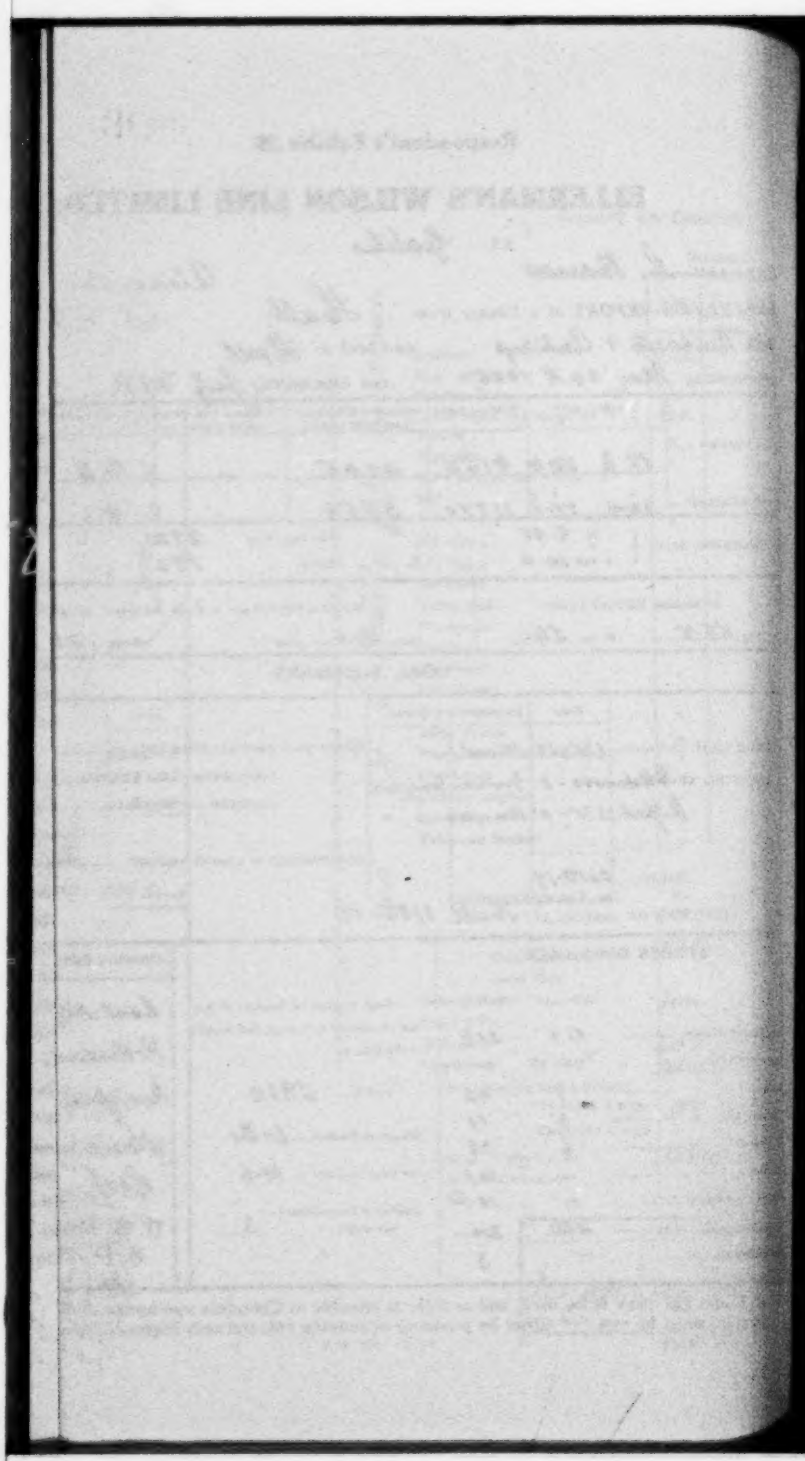
Condition	How Worked	When last Examined	Condition	Whether now reported Examination or not	REMARKS
Good	Well		good		
—	—		—		
Good	Well		Good		
				Yes	Steering Gear.

OUTWARD Tons	Cwts.	Hrs.	HOMEWARD Tons	Cwts.
650	12	377.35	604	8
		7.9	9	17
		02		1
16	0	Over	8	0
19	9	8.9	2	13
26	10	3.8		15
712	11		629	14
19	12			
		125	49	4
4	18	29	5	1
781	1		683	19

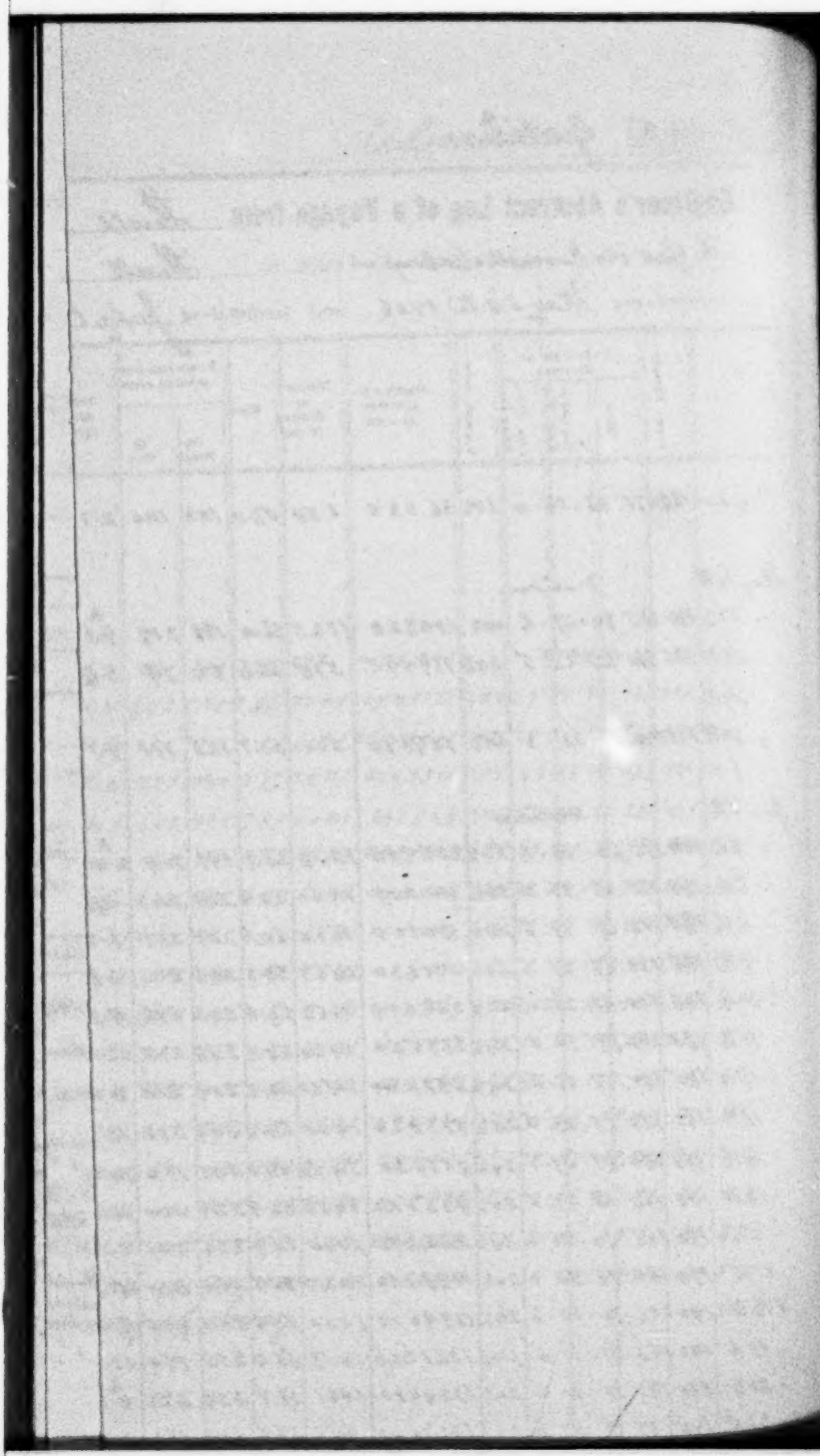
lers last cleaned.

Centre	

724-B



FOLD OUT IS TOO LARGE TO BE FILMED



[fol. 725] In United States District Court

[Title omitted]

Stipulation as to Notice of Claim

It is hereby stipulated and agreed between the parties hereto, that the libellants may prove at a later stage in these proceedings such notices of claim they may have given as may be in compliance with various provisions contained in the bills of lading on which suits are brought, and that libellants shall in no way be precluded from offering such proof before a Commissioner if the Court shall find for the libellants on the other issues in the case.

In witness whereof proctors for the respective parties have hereunto set their names this 28th day of March, 1930.

Bigham, Englar, Jones & Houston, Proctors for Libellants, by T. Catesby Jones. Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Respondent, by Cletus Keating.

[fol. 726] In United States District Court, Southern District of New York

A 96—206

Earle & Stoddart, Inc., et als., Libellants,

against

Ellerman's Wilson Line Limited, Respondent

In Admiralty. Suit in personam against steamship carrier for loss of cargo caused by burning and sinking of vessel.

Appearances:

Bigham, Englar, Jones & Houston (T. Catesby Jones, James W. Ryan, of Counsel) Proctors for Libellants.

Kirlin, Campbell, Hickox, Keating & McGrann (Cletus Keating, L. de Grove Potter, James H. Herbert, of Counsel) Proctors for Respondent.

MEMORANDUM

F. J. COLEMAN, J.:

Libellants were the various owners of a general cargo shipped under various bills of lading on the steamer "Galileo" which was owned and operated by the respondent. The boat left New York at about 10:30 A. M. on August 28, 1926, bound for Hull, England, and about six [fol. 727] hours later, when she was off Fire Island it was discovered that the coal in a temporary bunker was afire through spontaneous combustion. She returned to New York where partly as the result of shifting the coal and of pumping water into her, she sank two days later and became a total loss. Practically the entire cargo was lost and libellants sue to recover its value on the theory of breach of contract of carriage.

There is no charge of fault in the conduct of anyone after the discovery of the fire nor even after the departure of the ship from New York. Unquestionably, the immediate cause of the fire was the gross negligence of the ship's chief engineer in putting a new supply of coal on top of old coal that had become heated in the temporary bunker. The libellants contend that not only was the ship not seaworthy when she commenced the voyage, but that respondent had not exercised due care to make her so, and that therefore the respondent is liable for the loss of the cargo; while the respondent relies on the defense of the Fire Statute (U. S. C. A., Title 46, Sects. 182, 187).

The "Galileo" was a steel general cargo steamer, shelter deck type, of 6,300 tons gross, regularly employed between New York and her home port in Hull, England. She was properly manned, equipped and supplied and was rated in Lloyds Register in Class A1. The only charge of unseaworthiness made by libellants relates to the temporary bunker in the 'tween deck space, where the fire started, and to the coal in it.

It had been the practice to supply the ship with coal for a round trip, and to carry the fuel for the return voyage in various temporary bunkers. Due to a strike in England at [fol. 728] that period, coal was obtained here for the round trip, and on the voyage in question the temporary bunkers were filled even though it was planned that the "Galileo"

was not to return, because the surplus was to be transferred to another ship in Hull. When she arrived at New York on August 16th she had 160 tons still remaining in the temporary bunker in the 'tween deck space, which had not been consumed on the round trip. This coal was not removed when the ship was refueled for the voyage on which she was lost, but several hundred tons of the new supply was placed on top of it on August 26th. Two days later the ship departed and the fire was discovered in that compartment.

There are two aspects of the charge of unseaworthiness made by libellants, (1) the construction of the temporary bunker and (2) the fact that the new supply of coal was placed on top of the old, heated coal remaining in it.

It is undisputed that bituminous coal is in danger of spontaneous combustion if ventilation of the interior of the mass is permitted to a degree sufficient to allow oxidation of the coal, but insufficient to carry off the heat generated by the oxidation. Soft coal oxidizes when in contact with air, and the process is accelerated by an increase in temperature. The oxidation itself produces heat which if not carried off, will accelerate the process to the point of ignition. Consequently bunkers should be constructed so as to minimize the amount of air that may pass through the sides and bottom of the bunker into the mass of the coal, and some surface ventilation should be provided so as to carry off such gases as may be liberated. Putting a new [fol. 729] supply of coal on top of an old pile ordinarily entails some danger because the surface of the old pile, having been well aerated, is in process of oxidation and the new mass on top of it prevents the dissipation of the heat; furthermore, in the case of "run of the mine coal", as here involved, there is apt to be such a segregation of lumps as to permit air channels between the old and the new masses with a consequent supply of oxygen to the interior. If the old pile has already become hot, the danger of combustion from confining the heat by a superimposed new mass of coal, is, of course, vastly increased.

The temporary bunker in which the fire started was a compartment extending across the entire width of the vessel, fifty feet, and was formed by erecting a wooden bulkhead athwartship at a distance of 33 feet forward of the permanent cross bunker. It was thus merely a part of the

'tween deck cargo space enclosed between the wooden athwartship bulkhead and the forward wall of the permanent cross bunker. A large hatchway near its center gave access to it from the main deck.

The only questions in regard to its construction that need be considered in detail are whether this wooden bulkhead which separated it from the cargo space forward permitted air to pass into the interior of the mass of the coal to a dangerous degree, and if so, whether this contributed to the fire. Such air would oxidize the coal piled against the bulkhead and the resultant heat would be confined within the mass, with the consequence that there would be a tendency to spontaneous combustion.

[fol. 730] Two other questions in regard to the temporary bunker were raised in the course of the trial which may be summarily eliminated. Objection was raised to the arrangement of the two ventilators from the compartment to the main deck, on the ground that a sufficient draft would not be created to properly ventilate the surface of the mass; but the overwhelming weight of the evidence is that this could not have contributed to the fire. Indeed, two of libellants' own experts concurred in that opinion (Parr and Stanley). Also, there was some mention of the possibility of air penetrating the mass of coal through the rear wall of the temporary bunker which separated it from the permanent bunker. The latter, however, was filled with coal which did not ignite spontaneously, and it is impossible that air could have passed from it into the temporary bunker and caused a fire there, especially if, as libellants claim, the combustion started in the forward part of the temporary bunker.

Considering, then, the adequacy of the wooden bulkhead which formed the forward wall of the temporary bunker, it was constructed of vertical planks, 10 inches wide, 3 inches thick and 10 feet long, reaching from the floor to the top of the 'tween deck space, and held in place by having their ends inserted into slots on the floor and on the ceiling. The slots were formed by horizontal lumber fastened to the floor and to the ceiling, with a space between parallel pieces sufficient to accommodate the ends of the planks. The edges of the planks were planed and were placed tight together, and wooden battens three inches wide were nailed

over the crevices, from top to bottom and on both sides of [fol. 731] the bulkhead. A dust curtain made of closely woven fabric was nailed on the cargo side of the bulkhead, but since it was not air-tight, it was not important for our purpose.

The bulkhead was not absolutely air-tight, though it was dust-proof. Unquestionably some air could pass under the battens and through the crevices between the edges of the planks; also under the horizontal lumber and the ends of the planks. The amount, however, would be small unless there was a considerable difference in air pressure on the two sides of the bulkhead. This would not ordinarily occur because the cargo space forward and the bunker were enclosed between two steel bulkheads with nothing to cause a draft from one compartment to the other after the hatches were covered, except an improper operation of the ventilators. The cargo space and the temporary bunker each had two ventilators designed as an intake and outgo for each compartment, and if so operated there could be no material draft through the bulkhead. Of course the oxidation of the coal and the heat generated would have a tendency to draw air from the vicinity, including the crevices in the bulkhead; but that would be in small quantities.

The ideal bunker is absolutely air-tight below the level of the top of the coal, but has probably never been attained. The nearest approach to it in practice is in permanent bunkers constructed entirely of steel. Temporary bunkers always have at least one wooden bulkhead which necessarily permits the passage of some air into the body of the coal.

The use of a wooden bulkhead on a bunker, whether permanent or temporary, and the consequent penetration [fol. 732] of some air into the body of the coal does not, in itself, make a ship unseaworthy; otherwise every vessel with a temporary, bunker would be unseaworthy, and many more with wooden bulkheads on their permanent bunkers. The danger arising from the interior ventilation of the coal through the bunker wall is ordinarily obviated by not retaining the coal too long and by inspecting it from time to time and removing such parts as have become hot. These precautions have to be taken in even the best bunker, and in the case of those less safe they have to be increased.

The bulkhead in question was not the best type of wooden bulkhead from the standpoint of air-tightness. While I find that the planks and battens and horizontal pieces were all in good condition, other methods might have been adopted which would have been slightly more effective in excluding air. Sometimes wooden bulkheads are made of two thickness of overlapping planks, which would probably be more effective than single planks with battens on both sides. Sometimes paper is pasted over the crevices, which was not done in this case. Furthermore, caulking would probably have diminished the passage of air.

The preponderance of the evidence, however, is in favor of a finding that the bulkhead was reasonably suited to its purpose, and complied with the requirements of ordinary prudence. It was of a type in common use for bunkers, and while that fact in itself does not prove that the bulkhead was sufficient, from all the evidence I am convinced that it was. The experts on the two sides, of course, differed, but those for respondent had more weight. The principal [fol. 733] ones for the libellants, Parr and Porter, had practically no maritime exp rience and they with Stanley seemed to think that every bunker was unsafe which was not air-tight, a condition which cannot be attained in practice. On the other hand, the respondent produced the senior engineer surveyor for Lloyds Registry in New York, a surveyor of the Board of Underwriters of New York, and the chief surveyor of the Bureau Veritas of the International Register of Shipping for the United States and others especially Commander Star whose testimony supports this finding.

In determining the adequacy of the bulkhead there must be considered the normal period during which coal would be retained in the temporary bunker. The 160 tons had been in it for almost two months which was longer than would be expected, as the "Galileo" was operated, yet no fire occurred in it until it was covered with a new supply. It is true that hot spots had developed in it, but these were not significant, because they are apt to occur in any bunker after such a length of time.

Not only was the bulkhead adequate in my opinion but even if it did fall below the proper standard of safety, I do not believe that fact can be held a contributory cause of the

fire which occurred. This question has two aspects in that it relates to the period before and to the period after the new supply of coal was loaded. At the time the new supply was put on top of it, the old coal was in a sloping mass against the bulkhead and the sides of the vessel, about seven feet high and extending out about twice as far. Hot spots had developed in it of sufficient intensity to burn the boots of the trimmers. When the new coal was placed on [fol. 734] top of it and thus confined the heat, I believe that the air which made possible further oxidation was either retained on the surface of the old pile or found access through the channels formed by the lumps in the new supply. It seems to me impossible that the air which continued the oxidation could have come through the bulkhead at the back of the mass, especially in view of the fact that it only took two days for the fire to break out. It is impossible to determine with certitude where the combustion started, but I believe it much more likely to have first occurred over the hot spots which the trimmers encountered than back against the bulkhead. Assuming the heated condition of part of the old coal, I am convinced that the new supply would have caused a fire in even a perfect bunker.

As to the other aspect of the question, if it be assumed that the alleged deficiency of the bulkhead caused the heating of the old coal, I think it was merely a condition and not a contributing cause of the fire. Certainly the immediate cause was the gross negligence of the chief engineer in loading the new supply on top of the old coal which contained hot spots. These were of common occurrence in all types of bunkers and whatever the construction, were to be expected and guarded against before new coal was added. In themselves they would not have lead to fire, because in normal course all the old coal would have been removed within a few days. Assuming that the bulkhead were deficient, it would be pure surmise to say that this caused the actual hot spots; but even if that conclusion were reached, I believe that the deficiency merely gave rise to a [fol. 735] condition in the coal which would be not unusual in a proper bunker, and was not a contributing cause of the fire which was really brought about by covering the coal with a new supply.

There remains for consideration the question whether respondent is liable on account of the unseaworthiness

caused by the negligent act of the chief engineer in loading a new supply on the hot coal. Libellants claim that respondent failed in a non-delegable duty to have reasonable care exercised to make the vessel seaworthy before her departure. Concededly at the commencement of the voyage the "Galileo" had within her a condition so dangerous that a bunker fire was inevitable and did in fact result within six hours.

The Fire Statute, on which respondent relies for defense, provides, U. S. C. A., Title 46:

"Sec. 182. Loss by Fire.—No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

"Sec. 187. Remedies Reserved.—Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any [fol. 736] negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

It is apparent that the statute was intended to distinguish between the neglect of the owner as such and the negligence of the ship's officers; and to relieve the owner from all liability for damage to cargo caused by fire unless the fire was caused by the neglect of the owner as such. In the case at bar the fire was caused by the negligence of the ship's chief engineer. The libellants, however, contend that (1) as a matter of fact there was neglect by the owner in not maintaining such supervision as would have prevented or corrected the chief engineer's negligence, and (2) as a matter of law the negligence of the chief engineer is chargeable to the owner notwithstanding the distinction between the two in the statute.

In reference to the alleged actual neglect by the owner, it appears that respondent had no marine superintendent nor superintending engineer nor other similar shore representative at New York though this was one of the terminals of the line. When the boat arrived here on her last voyage, it was not intended to carry back any surplus coal beyond what was needed for the journey home, but the respondent cabled directions to carry 850 tons additional for transfer to a sister ship. The master and the chief engineer there-[fol. 737] upon decided to carry part of this additional coal in the 'tween deck temporary bunker, and the chief engineer alone decided to load it on top of 160 tons which remained from the previous voyage. The owner was chargeable with notice that the 'tween deck compartment might be used as a temporary bunker, but had no notice that old coal remained in it, that this coal had hot spots and that the new supply would be put on top of it. Respondent had previously given written instructions to its ship engineers (Ex. G) including that of the "Galileo", to see that coal was not permitted to remain in a bunker indefinitely, but was all cleaned out before new coal was added or at least put into such position that it would be used before the new coal.

The matter of determining whether to remove old coal from a temporary bunker before loading a new supply in it was within the province of a chief engineer of a steamer. It would be unusual for an owner or a shore representative to determine a detail of that sort, because it was an act of operation or management of the ship which would naturally be left to its officer. It was not neglect on the owner's part not to have a shore representative at New York, but even if there had been one he would not normally have participated in the chief engineer's decision on that point. There was no way in which respondent could have prevented the mistake except by having a shore representative supervise every detail of the operation and management of the ship while in port, which the law does not require.

Nor could due diligence on the owner's part have corrected the evil before the vessel commenced her voyage. Once the new supply had been loaded no inspection of the [fol. 738] temporary bunker would have disclosed the danger until about the time of the departure. Less than two days elapsed between the completion of the loading and the departure and during most, if not all, of that period an in-

spection would have been futile. There was, therefore, no neglect on the part of the owner as distinguished from that of the chief engineer which contributed to the fire.

Libellant's contention that respondent is liable for the loss even though it was caused solely by the negligence of the chief engineer is based on the theory that respondent was under a contractual obligation to the shippers that reasonable care be exercised by all concerned to make the vessel seaworthy before she left port. It is not contended that the doctrine of respondent superior makes respondent liable, but that the negligence of the chief engineer caused a breach of contract on the part of the owner. The Fire Statute, however, was a part of the contract and respondent's contractual obligation does not cut down such exemption as may have been granted by the statute.

Libellants constrne the statute to mean that the exemption is granted only upon condition that the owner's general maritime obligation in regard to the seaworthiness of the vessel at the commencement of the voyage be fulfilled to the extent of having due care exercised by all connected with it, whether the owner's representatives or the ship's officers; in other words, that the distinction which the statute makes between the owner's neglect and the ship officers' negligence has no application to matters affecting the seaworthiness of the vessel at the commencement of the [fol. 739] voyage. In support of this contention are cited many cases involving the Harter Act.

It should be noted that the Fire Statute has no particular application to a vessel on a voyage, and makes no mention whatever of its seaworthiness. In the Harter Act an express condition of the exemption from liability is that the owner exercise due diligence to make the vessel seaworthy, and the courts have construed this to include due diligence on the part of the officers. In the Fire Statute such express provision is entirely lacking, and the exemption is granted merely on the condition that the fire be not caused by the design or neglect of the owner which is distinguished in the statute from the negligence or malfeasance of an officer. To adopt libellant's construction would be to read into the statute a provision similar to that expressly stated in the Harter Act, which I believe is beyond the Court's power.

In each of the cases upon which libellants rely where an owner was held liable for damages caused by fire, there was

actual neglect on the part of the owner as such, and not merely negligence of an officer of the ship. (Arkell & Douglass, Inc. v. United States, 13 Fed. (2d) 55; Bank Line v. Porter, 25 F. (2d); Williams S. S. Co. v. Wilbur, 9 F. (2d) 622; The Etna Maru, 33 Fed. (2d) 232.) There are no expressions in these opinions indicating that the exemption given to owners by the Fire Statute excludes such acts of negligence by the ship's officers as cause the vessel to be unseaworthy before breaking ground. It is true that in the case of the "Etna Maru" the opinion in the District Court did contain such expressions (20 Fed. (2d) 143), but they were not approved in the Circuit Court of Appeals.

[fol. 740] Finally libellants contend that in the bills of lading respondent waived the protection of the Fire Statute. There are no provisions in the bills of lading that tend to indicate such an intention, but if there were they would be completely negatived by one of the following clauses, either of which appears in each bill of lading:

"It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes."

"This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

Decree for respondent.

Frank J. Coleman, U. S. D. J.

August 19, 1930.

[fol. 741] In United States District Court, Southern District of New York

Present: Honorable Frank C. Coleman, District Judge.

Earle & Stoddart, Inc.; Earle, Stoddart & Clayton, Ltd.; E. Capelcure & Co., Ltd.; Strauss & Co., Ltd.; Micks, Lambert & Co.; John Doe Micks, Richard Roe Lambert, John Doe and Richard Roe, Copartners, Trading under

the Name and Style of Micks, Lambert & Co.; Sanday & Co., Inc.; Henry Leetham & Sons, Limited; Sanday & Co., Limited; W. S. Williamson & Co.; W. S. Williamson, John Doe and Richard Roe, Copartners, Trading under the Name and Style of W. S. Williamson & Co.; Kingan & Company; Kingan & Co., Ltd.; Schuckl & Company, Inc.; Cooperative Wholesale Society, Ltd., Pelling, Stanley & Co., Ltd.; A. E. Staley Mfg. Co.; H. Lionel Tydeman & Co.; H. Lionel Tydeman, John Doe and Richard Roe, Copartners, Trading under the Name and Style of H. Lionel Tydeman & Co.; A. E. Chew; Stuebing Truck Company; W. P. Notcutt, Limited; R. E. Dietz Company; E. & F. Turnbull, Ltd.; Certainteed Products Corporation; B. L. Roberts; F. E. Booth Co., Inc.; United Sales Organizations, Ltd.; The New Jersey Zinc Sales Co., Inc.; Morris Ashby, Limited; Republican Mining & Metal Co., Ltd.; The Cookson Lead & Antimony Co., Ltd.; James Hewitt & Co., Ltd.; United States Steel Products Company; Ruston & Hornsby, Limited; California Packing Corporation; R. & W. Davidson, Limited; J. V. Faber & Co., Ltd.; Metcalfe's Stores, Ltd.; Broughs, Ltd.; Thomas Bell & Son, Ltd.; Buemann & Riley Bros., Ltd.; W. P. Tanner-Gross & Company, Inc.; Watson & Philip, Ltd.; Wilson D. Lyon, Loren M. Cowdrey and A. Gordon Wilson, Copartners, Trading under the Name and Style of Lyon, Cowdrey & Wilson; Angus Watson & Co., Ltd.; Hawaiian Canneries Co., Ltd.; The Baserot [fol. 742] Company; Barry Hall & Co., Inc.; Meredith Brothers & Co., Ltd.; Simpson, Roberts & Co., Ltd.; Acheson Graphite Company; Cromil Engineering Co., Ltd.; T. M. Sinclair & Co., Ltd.; W. P. Sinclair & Co., Ltd.; Bemis Bros. Bag Company; Joseph Rank, Ltd.; Griffith-Durney Company; Morris & Jones, Limited; Walker Canning Company; Armour & Company, Ltd.; Pillsbury Flour Mills Company; Edward Rathbone & Son; Edward Rathbone, John Doe Rathbone, Richard Roe Rathbone, John Doe and Richard Roe, Copartners, Trading under the Name and Style of Edward Rathbone & Son; American Chain Company, Inc.; Joh. Olafsson & Co.; Joh. Olafsson; John Doe and Richard Roe, Copartners, Trading under the Name and Style of Joh. Olafsson & Co.; Tide Water Oil Company; Armour & Company; North American Provision Company; Morris & Co., Ltd.;

A. V. Berner & Company, Inc.; James Arnott & Sons, Ltd.; James B. Berry Sons Company, Inc.; Consolidated Dairy Products Co.; Roberts & Schaefer Company, Hugh Wood & Co., Ltd.; Goodall Clayton & Co., Ltd.; L. Sonneborn Sons, Inc.; Waverly Oil Works Co.; Jacob Dold Packing Company; The Leavitt Machine Co.; Caldwell & Company, Inc.; Langstaff Erembert & Co., Ltd.; The Barber Asphalt Company; Walter M. Field & Company; Walter M. Field, John Doe and Richard Roe, Copartners, Trading under the Name and Style of Walter M. Field & Company; A. M. Landauer, B. Landauer, W. T. Hammond and D. J. Saunders, Copartners, Trading under the Name and Style of Landauer & Company; Bay Side Canning Co.; Starr Fruit Products Company; Gabriel Nachman, Inc.; Jebb Bros., Ltd.; George F. Smith & Son, Limited; Strathmore Paper Company; California Co-Operative Canneries; M. B. Jones & Co., Inc.; Cargo Superintendents, Ltd.; Grain Union, Ltd.; Reynolds, Stott & Haslegrave, Ltd.; Keighley, Maxsted & Company, John Doe Keighley, Richard Roe Keighley, John Doe Maxsted, Richard Roe Maxsted, John Doe and Richard Roe, Copartners, Trading under the Name and Style of Keighley, Maxsted & Company; Canadian Co-Operative Wheat Producers, Ltd.; A. Zerega's Sons, Consolidated; Continental Produce Company, Ltd.; Federated Metals Corporation; The Felling Zinc Oxide Co., Ltd.; Heskel Supply Co., Inc.; Soeteman Freres, John Doe Soeteman, Richard Roe Soeteman, John Doe and Richard Roe, Copartners, Trading under the Name and Style of Soeteman Freres; S. Henle, Inc.; Bartoline (Hull), Ltd.; Thomas-Body Company, Inc.; Morris & Co. (Meat Importers), Ltd.; Pitt & Scott, Inc.; Bureau [fol. 743] of American Mfgrs. in Europe, Ltd.; Arthur I. Rackliff, R. J. Heinz Co.; R. J. Heinz Company, Ltd.; J. Stevens Arms Company; High Rock Knitting Company; A. T. Singer; Wilson & Co., Inc.; Wilson & Co., Inc.; Melady Grain Co., Inc.; Spear & Thorpe; John Doe Spear, Richard Roe Thorpe, John Doe and Richard Roe, Copartners, Trading under the Name and Style of Spear & Thorpe; O. M. Earle Co., Inc.; Humber Fruit Brokers, Ltd.; E. I. du Pont de Nemours & Company, Inc.;

Kynoch, Ltd.; Vickers, Ltd.; Nobel Industries, Ltd., Plaintiffs,

against

Ellerman's Wilson Line, Limited, Respondent

Decree—Sept. 26, 1930

The issues in this cause having duly come on to be heard before this Court on the pleadings and proofs adduced by the respective parties, and having been duly argued by counsel for the respective parties, and due deliberation having been had thereon, and the Court having filed its opinion in writing, dismissing the libel herein, and the costs of the respondent having been duly taxed at the sum of $748.05,

Now, on motion of Kirlin, Campbell, Hickox, Keating & McGrann, proctors for the respondent, Ellerman's Wilson Line, Limited, it is

Ordered, adjudged and decreed that the libel herein be, and it hereby is, dismissed with costs; and it is further

Ordered, adjudged and decreed that the respondent, Ellerman's Wilson Line, Limited, have, receive and recover of and from the libelants, Earle & Stoddart, Inc.; Earle, Stoddart & Clayton, Ltd.; E. Capelcure & Co., Ltd.; Strauss & Co., Ltd.; Micks, Lambert & Co.; John Doe Micks, Richard [fol. 744] Roe Lambert, John Doe and Richard Roe, copartners, trading under the name and style of Micks, Lambert & Co.; Sanday & Co., Inc.; Henry Leetham & Sons, Limited; Sanday & Co., Limited; W. S. Williamson & Co.; W. S. Williamson, John Doe and Richard Roe, copartners, trading under the name and style of W. S. Williamson & Co.; Kingan & Company; Kingan & Co., Ltd.; Schuckl & Company, Inc.; Co-operative Wholesale Society, Ltd.; Pelling, Stanley & Co., Ltd.; A. E. Stanley Mfg. Co.; H. Lionel Tydeman & Co.; H. Lionel Tydeman, John Doe and Richard Roe, copartners, trading under the name and style of H. Lionel Tydeman & Co.; A. E. Chew; Stuebing Truck Company; W. P. Notcutt, Limited; R. E. Dietz Company; E. & F. Turnbull, Ltd.; Certain-Teed Products Corporation; B. L. Roberts; F. E. Booth Co., Inc.; United Sales Organizations, Ltd.; The New Jersey Zinc Sales Co., Inc.; Morris Ashby, Limited; Republican Mining & Metal Co., Ltd.; The Cookson Lead & Antimony Co., Ltd.; James

Hewitt & Co., Ltd.; United States Steel Products Company; Ruston & Hornsby, Limited; California Packing Corporation; R. & W. Davidson, Limited; J. V. Faber & Co., Ltd.; Metcalfe's Stores, Ltd.; Broughs, Ltd.; Thomas Bell & Son, Ltd.; Buemann & Riley Bros., Ltd.; W. P. Tanner-Gross & Company, Inc.; Watson & Philip, Ltd.; Wilson D. Lyon, Loren M. Cowdrey and A. Gordon Wilson, copartners, trading under the name and style of Lyon, Cowdrey & Wilson; Angus Watson & Co., Ltd.; Hawaiian Canneries Co., Ltd.; The Baserot Company; Barry Hall & Co., Inc.; Meredith Brothers & Co., Ltd.; Simpson, Roberts & Co., Ltd.; Acheson Graphite Company; Cromil Engineering Co., Ltd.; T. M. Sinclair & Co., Ltd.; W. P. Sinclair & Co., [fol. 745] Ltd.; Bemis Bros. Bag Company; Joseph Rank, Ltd.; Griffith-Durney Company; Morris & Jones, Limited; Walker Canning Company; Armour & Company, Ltd.; Pillsbury Flour Mills Company; Edward Rathbone & Son; Edward Rathbone, John Doe Rathbone, Richard Roe Rathbone, John Doe and Richard Roe, copartners, trading under the name and style of Edward Rathbone & Son; American Chain Company, Inc.; Joh. Olafsson & Co.; Joh. Olafsson, John Doe & Richard Roe, copartners, trading under the name and style of Joh. Olafsson & Co.; Tide Water Oil Company; Armour & Company; North American Provision Company; Morris & Co., Ltd.; A. V. Berner & Company, Inc.; James Arnott & Sons, Ltd.; James B. Berry Sons Company, Inc.; Consolidated Dairy Products Co.; Roberts & Schaefer Company, Hugh Wood & Co., Ltd.; Goodall Clayton & Co., Ltd.; L. Sonneborn Sons, Inc.; Waverly Oil Works Co.; Jacob Dold Packing Company; The Leavitt Machine Co.; Caldwell & Company, Inc.; Langstaff Erembert & Co., Ltd.; The Barber Asphalt Company; Walter M. Field & Company; Walter M. Field, John Doe and Richard Roe, copartners, trading under the name and style of Walter M. Field & Company; A. M. Landauer, B. Landauer, W. T. Hammond and D. J. Saunders, copartners, trading under the name and style of Landauer & Company; Bay Side Canning Co.; Starr Fruit Products Company; Gabriel Nachman, Inc.; Jebb Bros., Ltd.; George F. Smith & Son, Limited; Strathmore Paper Company; California Cooperative Canneries; M. B. Jones & Co., Inc.; Cargo Superintendents, Ltd.; Grain Union Ltd.; Reynolds, Stott & Hasle-

grave, Ltd.; Keighley, Maxsted & Company, John Doe [fol. 746] Keighley, Richard Roe Keighley, John Doe Maxsted, Richard Roe Maxsted, John Doe and Richard Roe, copartners, trading under the name and style of Keighley, Maxsted & Company, Canadian Cooperative Wheat Producers, Ltd.; A. Zerega's Sons, Consolidated; Continental Produce Company, Ltd.; Federated Metals Corporation; The Felling Zinc Oxide Co., Ltd.; Heskel Supply Co., Inc.; Soeteman Freres, John Doe Soeteman, Richard Roe Soeteman, John Doe and Richard Roe, copartners, trading under the name and style of Soeteman Freres; S. Henle, Inc.; Bartoline (Hull), Ltd.; Thomas-Body Company, Inc.; Morris & Co. (Meat Importers), Ltd.; Pitt & Scott, Inc.; Bureau of American Mfgrs. in Europe, Ltd.; Arthur I. Rackliff, R. J. Heinz Co.; R. J. Heinz Company, Ltd.; J. Stevens Arms Company; High Rock Knitting Company; A. T. Singer; Wilson & Co., Inc.; Wilson & Co., Inc.; Melady Grain Co., Inc.; Spear & Thorpe; John Doe Spear, Richard Roe Thorpe, John Doe and Richard Roe, copartners, trading under the name and style of Spear & Thorpe; O. M. Earle Co., Inc.; Humber Fruit Brokers, Ltd.; E. I. du Pont de Nemours & Company, Inc.; Kynoch, Ltd.; Vickers, Ltd.; Nobel Industries, Ltd., and their stipulators for costs, the sum of $748.05, its costs as taxed, with interest thereon until paid, and that the said respondent have execution against the libelants and their stipulators for costs therefor; and it is further

Ordered that unless this decree be satisfied, or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for the libelants, execution may issue against the libelants and the stipulators for costs, to obtain satisfaction of this decree.

Frank J. Coleman, U. S. D. J.

[fol. 747] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that Earle & Stoddart, Inc., et als., the libellants in the above-entitled cause, hereby appeal to the United States Circuit Court of Appeals for the

Second Circuit from the final decree signed herein on the 26th day of September, 1930, and entered herein the 1st day of October, 1930, and from each and every part of said decree.

Dated December 23rd, 1930.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellants, Earle & Stoddart, Inc., et als., No. 64 Wall Street, New York City.

To Charles Weiser, Esq., Clerk; Kirlin, Campbell, Hickox, Keating & McGrann, Esqs., Proctors for Respondent, 27 William Street, New York City.

Appeal allowed December 23, 1930.

Woolsey, United States District Judge.

[fol. 748] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

1. The Court erred in failing to hold that when the respondent admitted that it did not deliver the cargo at destination, and then introduced evidence establishing that it breached the warranty of seaworthiness in the contract by supplying a dangerously unseaworthy vessel at the time the "Galileo" sailed from New York, and failed to show that due diligence to make her safe and seaworthy was in fact exercised by it and the vessel's officers up to the instant of sailing, the libellants' cause of action was complete and that no subsequently-occurring event during the voyage, such as the outbreak of fire resulting inevitably from the preceding unseaworthiness, could be relied upon as a defense or excuse for the previously committed breach.

2. After finding as facts that the "Galileo" was in dangerously unseaworthy condition when she sailed from New York and that loss from this cause was inevitable and [fol. 749] did in fact result within six hours thereafter, and the respondent having failed to show that due diligence was exercised by it and the vessel's officers up to the moment of sailing to make the "Galileo" safe and seaworthy, the Court erred in failing to draw the legal inference that the

dominant and proximate cause of loss was unseaworthiness, and that the mere fact that the damages resulting from the unseaworthiness subsequently took the incidental form of a fire, did not entitle the respondent to exemption from liability under the Fire Statute.

3. The Court erred in holding that in a case in which a fire is the result of unseaworthiness on sailing from the loading port, and the cause of the unseaworthiness is the failure of competent persons to inspect or remedy a dangerous and unseaworthy condition which was apparent and observable before sailing, the Fire Statute nevertheless relieves the shipowner from liability because one of the persons whose attention was called to the unseaworthy condition and who did nothing to remedy it before sailing happened to be an engineer officer of the vessel.

4. The Court erred in holding that the due diligence required by the express warranty in the bill of lading that the vessel would be seaworthy on sailing from the loading port provided due diligence of competent persons could make her so meant due diligence in selecting a ship's engineer officers or in obtaining certificates, and did not mean that due diligence in connection with seaworthiness would in fact have to be used by competent persons up to the time of sailing.

[fol. 750] 5. The Court erred in failing to hold that the mere fact that fire was made an excepted peril by the Fire Statute, and was mentioned generally as one of the excepted perils in the bill of lading, did not relieve the shipowner from the consequences of the breach of the express warranty in the bill of lading that seaworthiness at the time of sailing from the loading port was warranted in so far as the actual exercise of due diligence by the shipowner personally, or by competent inspectors employed by it, up to the moment of sailing, could make her seaworthy.

6. The Court erred in holding that by enacting a statute making fire one of the excepted perils, Congress intended also by implication to relieve the shipowner from his warranty that due diligence would in fact be used by competent persons up to the time of sailing from the loading port to make the vessel seaworthy.

7. The Court erred in failing to hold that the Fire Statute does not exonerate a shipowner from liability for damages to goods in a case in which the dominant cause of the damage is unseaworthiness, and in which the fire is an inevitable and intermediate result of the unseaworthiness.

8. The Court erred in failing to hold that the respondent was personally negligent in not employing a competent person to make an inspection of the "Galileo" or her reserve or excess bunkers before sailing from the loading port, New York, at which the cargo had been booked and the excess coal loaded.

9. The Court found as a fact that the damage to this cargo was inevitable at the time the "Galileo" sailed from [fol. 751] New York. The respondent admitted by written stipulation that the damage resulted from the fire, and the Court found that the fire resulted inevitably from the unseaworthiness of the vessel at the time of sailing.

10. The Court erred in failing to hold that the Fire Statute does not relieve a shipowner from liability if the fire is inevitable on the vessel's sailing from the loading port and if the dominant cause of the subsequent fire was an unsafe and unseaworthy condition on sailing which was observable or otherwise ascertainable before sailing and which could have been prevented or remedied by efforts of competent persons in the actual exercise of due diligence.

11. The Court erred in holding that it was Chief Engineer Oxtoby alone who was negligent and who loaded the new coal on the old, thus causing the inevitable fire.

12. The Court erred in failing to hold that the ordinary scope of Oxtoby's duties as chief engineer of the "Galileo" were limited to the stowage and care of coal which was intended to be used in the furnaces on the "Galileo".

13. The Court erred in holding that it was within the ordinary scope of a chief engineer's duties on a vessel to stow and care for 850 tons of coal which was not intended ever to be used as fuel on that vessel, but was merely being carried as cargo to another port to be used as fuel on other vessels.

14. The Court erred in failing to hold that the evidence did not establish that this 850 tons of excess or "Francisco"

[fol. 752] coal was ever in fact used as fuel on the "Francisco" after arrival at destination, or was in fact being carried otherwise than as cargo for sale in the open markets at destination.

15. The Court erred in failing to find that the managing owner of the respondent at Hull cabled the respondent's New York general cargo contracting and booking agent to ship 850 tons of coal on the "Galileo" for carriage as cargo to Hull to be used on another vessel; that the respondent's New York agent through Hicks, its pier superintendent, then purchased the coal and employed the stevedore Magarelli and his gang to load it on the "Galileo"; that Magarelli thereupon began loading the coal into the 'tween deck and other places designated not by the chief engineer, but by Hicks, who had conferred with the master; and that Magarelli thereupon began loading and completed the loading of the coal without receiving any instructions from or seeing the chief engineer at any time excepting to register a complaint with him regarding its dangerous condition after a considerable part of the coal had been loaded.

16. After finding that the libellants had shipped a general cargo on the "Galileo" as a common carrier; that the cargo had not been delivered at destination; that the "Galileo" was so unseaworthy and in such dangerous condition on sailing that a bunker fire was inevitable and did in fact result within six hours, and that neither the shipowner, the chief engineer nor anyone else made any effort [fol. 753] to correct any unseaworthiness that was observable on sailing or shortly before sailing; and in view of the written stipulation and concession by counsel for respondent that total loss of ship and cargo from such bunker fire on the "Galileo" was inevitable, the Court erred in failing to draw the legal inference that the respondent had failed to establish that the dominant and proximate cause of loss was fire, and not unseaworthiness, and in holding that the respondent had sustained the special defense of fire set up in its answer and was, accordingly, entitled under the Fire Statute to exemption from liability.

17. The Court erred in failing to hold that the respondent waived the benefit of the Fire Statute so far as loss from unseaworthiness was concerned by inserting in a special

clause in the bill of lading contract that it would be liable for loss from unseaworthiness unless due diligence was in fact exercised by itself and its representatives and by the officers of the "Galileo" to make the "Galileo" seaworthy on sailing.

18. The Court erred in holding that a shipowner is entitled to exemption from liability under the Fire Statute in a case in which the proximate cause of loss is unseaworthiness on sailing, and in which no fire occurred until after sailing and was then only a minor or immediate cause which inevitably followed from the preceding condition of dangerous unseaworthiness on sailing.

19. The Court erred in failing to hold that the proximate cause of loss being a dangerously unseaworthy condition [fol. 754] existing at time of sailing when no fire existed, the respondent was not entitled to rely in defense on a subsequently occurring fire which inevitably resulted from such unseaworthy condition and which was, therefore, only a minor and subsequently occurring expression of the previous unseaworthiness.

20. The Court erred in drawing the legal inference that in a case in which unseaworthiness on sailing from the loading port is the dominant and proximate cause of loss a common carrier by sea may exempt itself from liability by showing that no one used any care to make the vessel seaworthy on sailing, and that the chief engineer particularly was grossly careless before sailing.

21. The Court erred in failing to hold that as the written contract was at least ambiguous as to the applicability of the Fire Statute exception or the exception of unseaworthiness provided due diligence was in fact exercised by the vessel's officers and the respondent and its representatives up to the moment of sailing; and that, as the ambiguous language was drafted and printed in the bill of lading by the respondent, the ambiguity should be resolved against it.

22. After finding that the respondent cabled directions to carry 850 tons of coal additional on the "Galileo" for transfer to a sister ship at destination; that the respondent was chargeable with notice that the 'tween deck compartment might be used as a temporary bunker; that hot spots

were of common occurrence in all types of bunkers and [fol. 755] whatever the construction, and were to be expected and guarded against before new coal was added; and that it was the loading of this additional coal on the old coal that caused the fire, the Court erred in failing to hold that the respondent was personally negligent in not giving instructions to the master authorizing the incurring of expense of shifting or discharging the old bunker coal in the reserve 'tween deck bunker or in constructing another bunker compartment or incurring other necessary expense, or in failing to ascertain before issuing such absolute order to the master whether or not the conditions on the "Galileo" were such that 850 additional tons of coal could safely be carried.

23. The Court erred in failing to hold that the carriage, pursuant to respondent's personal order, of 850 tons additional coal on the "Galileo" for transfer to a sister ship at destination was a subject outside the scope of the ordinary duties of the chief engineer of the "Galileo", in view of the facts that the coal was not intended ever to be used on the "Galileo" and that the respondent realized this by issuing the order not to the chief engineer but to the respondent's New York shore representative of the "Galileo".

24. The Court erred in failing to hold that the managing officers of respondent had personal knowledge that this new and unusual quantity of coal would be loaded on the old coal in the bunkers because their cable order to the New York agents directed "Galileo" load 850 bunkers transference "Francisco".

[fol. 756] 25. The Court erred in failing to hold that it was the managing officers of the respondent, by means of their cable order of August 20, 1926, and not the chief engineer of the "Galileo", who decided that the new coal should be loaded in the bunkers and not in any space remaining in the cargo holds.

26. The Court erred in failing to hold that the respondent had not established that the respondent's personal order to load 850 tons in the bunkers could be carried out without a substantial quantity of such new coal being loaded on the old and dangerously heated coal.

27. The Court erred in failing to hold that respondent's order that 850 tons of coal be loaded in the bunkers for transference to the "Francisco" was forwarded by the respondent's New York agent to the stevedoring company without further instruction or qualification, and that after a considerable quantity of such additional coal had been loaded by the stevedores into this 'tween deck bunker and the very dangerous condition noted, the chief engineer was consulted for the first time with reference to it.

28. The Court erred in failing to hold that the respondent was bound by the testimony of the chief engineer of the "Galileo" that in view of the conditions existing on the "Galileo" the only possible method of complying with the respondent's cable order that 850 tons of coal be loaded in the bunkers of the "Galileo" for transference to the "Francisco" was by loading such coal on top of the old and dangerously heated 160 tons of coal in No. 3 'tween decks [fol. 757] unless that part of the "Galileo's" own bunker coal should be taken completely out of her bunkers and put in a hold reserved solely for cargo, namely, No. 2 shelter deck.

29. The Court erred in failing to hold that the 850 tons additional coal on the "Galileo" for transfer to a sister ship at destination was cargo and not bunker coal on the "Galileo" and, therefore, was outside the scope of the chief engineer's duties as chief engineer of the "Galileo".

30. The Court erred in failing to hold that the respondent was negligent in not instructing the master of the "Galileo" that the 850 tons additional coal should be carried by the "Galileo" as cargo in her cargo holds and not be mixed with the "Galileo's" own coal supply in her bunkers.

31. The Court erred in failing to hold that the respondent was negligent in issuing a special, unusual and unqualified order that 850 tons additional coal be carried on the "Galileo" for transfer to a sister ship at destination without giving any instructions to the master or chief engineer of the "Galileo" or authority to them with reference to incurring any necessary expense to enable such an unusual order to be carried out with safety.

32. The Court erred in failing to hold that the act of the respondent in ordering the "Galileo" to go to sea with-

out any adequate examination ever having been made of her while she was in the port of New York to determine whether or not she was safe and seaworthy to proceed to sea, and [fol. 758] without due diligence being in fact exercised to make her seaworthy, was a personal negligent act of the respondent.

33. The Court erred in failing to hold that the managing officers of the respondent were personally negligent in booking and loading cargo as a common carrier at New York and in then sending the vessel to sea without any adequate examination having been made of her while she was in the port of New York to determine whether or not she was safe and seaworhy to proceed to sea and without due diligence being in fact exercised to make her seaworthy.

34. The Court erred in failing to hold that the respondent was negligent in sending the "Galileo" once too often to sea without adequate examination of her in port, and that they acted from carelessness or economy or both, both being equally reprehensible.

35. The Court erred in failing to hold that the managing officers of the respondent were negligent in not asking the chief engineer or master of the "Galileo" for a report on the condition of the old coal in the bunkers or on the safety of loading and carrying new excess coal in the bunkers before they issued the arbitrary order that it be carried in her bunkers.

36. The Court erred in failing to hold that under the Fire Statute and the Maritime Law, it is not enough for a shipowner to show that one of the contributing causes to the happening of the fire was his servant's fault; and that he must show that his own fault was not also a contributing cause.

[fol. 759] 37. The Court erred in failing to hold that the managing officers of the respondents were negligent in not making inquiry before the "Galileo" sailed from New York regarding the condition of her bunker coal and in not instructing the master or chief engineer to make reports at regular periods.

38. The Court erred in failing to hold that the managing officers of the respondent were negligent in not making in-

quiry, or requiring regular reports, about the condition of the coal on the "Galileo" during the abnormal and temporary period during which she was carrying abnormal quantities of coal because of a strike in Enland, the carriage of which excess coal was known to the managing officers of the respondent to be dangerous in view of the Court's finding that hot spots are known by ship operators to occur subsequently in coal which is not consumed promptly or during the course of the current voyage.

39. The Court erred in holding that Congress intended by the Fire Statute to relieve a shipowner from his duty of seeing to it that due diligence is exercised to make his vessel seaworthy at the time she sails from her loading port.

40. The Court erred in holding that a clause inserted by a shipowner in the bill of lading could reduce the shipowner's duty of seeing to it that due diligence is exercised to make his vessel seaworthy at the time she sails from her loading port.

41. The Court erred in holding that the Fire Statute relieves a shipowner from liability for a loss caused by un- [fol. 760] seaworthiness on sailing from the loading port.

42. After finding that the theory of the libellants' suit was for breach of contract of carriage, and that on sailing from the loading port the "Galileo" was in such unseaworthy and dangerous condition that damage to all cargo on board was inevitable, the Court erred in not entering an interlocutory decree on the merits in favor of the libellants awarding recovery of all damages caused by such unseaworthiness and breach of contract.

43. The Court erred in holding that a subsequently-occurring event like fire could relieve a shipowner from an already existing liability for breach of contract committed at the time the vessel sailed from New York by supplying a vessel in such unseaworthy and dangerous condition that damage to all cargo on board was inevitable.

44. The Court erred in failing to hold that the hot spots in the old coal were a contributing cause of the damage to the cargo.

45. The Court erred in holding that the putting of a new supply of coal on top of the old coal that had become

heated in the temporary bunker was the sole contributing cause to the damage to the cargo.

46. The Court erred in failing to hold that the dangerously heated condition of the old coal was a co-operating and contributing cause with the putting of a new supply on top of the old coal.

[fol. 761] 47. The Court erred in holding that a shipowner may delegate to an independent stevedoring company at the loading port his entire duty of seeing to it that due diligence is exercised to make his vessel seaworthy on sailing from the loading port notwithstanding he fails to authorize or instruct the stevedoring company that he will pay all necessary expenses incurred in making the vessel seaworthy in the nature of removing or shifting old coal or erecting a new coal compartment, and notwithstanding the stevedoring company had no experience and is incompetent in making a vessel seaworthy.

48. The Court erred in holding that a shipowner may delegate to the chief engineer of his vessel the entire shipowner's duty of seeing to it that due diligence is exercised to make the vessel seaworthy on sailing from her loading port.

49. The Court erred in failing to hold that it was the personal act of the respondent's managing officers in ordering the unusual and excessive quantity of new coal for the S. S. "Francisco" to be loaded on the "Galileo" and the carrying out of that order by the stevedore Magarelli that was the proximate cause of the cargo damage, and that it was no excuse that third parties like the chief engineer did not interfere with the respondent's and stevedore's actions.

50. The Court erred in failing to find that respondent's own evidence established that the stevedore Magarelli had to a considerable extent, carried out respondent's personal order that the new coal be loaded on the "Galileo" before Magarelli received any instructions from the chief engineer [fol. 762] of the "Galileo" or even consulted or saw him.

51. The Court erred in failing to hold that it was only after the stevedore Magarelli had loaded a considerable quantity of the new coal in this temporary or reserve

'tween deck bunker and had thus carried out, to a substantial extent, the personal order of the respondent's managing officers that the additional 850 tons for the S. S. "Francisco" be loaded on the "Galileo", that Magarelli or anyone connected with the stevedoring company received any instructions whatever from the chief engineer or the captain of the "Galileo" with reference to where or how the coal should be loaded on her.

52. The Court erred in failing to hold that the respondent was bound by the testimony of its stevedore Magarelli that up to the time he complained about further loading of new coal on dangerously heated coal, he had received no instructions from the chief engineer or the master of the "Galileo" with reference to where or how the new coal was to be loaded.

53. The Court erred in failing to hold that the personal order of the managing officers of the respondent to the master of the "Galileo" was simply passed on by the master to the stevedoring company and respondent's shore representatives without any conference or consultation with the chief engineer of the "Galileo", and that the disposition made of the remainder of the 850 tons not loaded in this temporary bunker showed that the master and stevedores regarded this excess 850 tons as cargo and not [fol. 763] as bunker coal of the "Galileo" within the scope of the ordinary duties of the chief engineer.

54. The chief engineer of the "Galileo", having confessed at the trial that he had deliberately lied about the material facts of this case after the fire had occurred, and it being evident that his reversal of testimony at the trial was as an interested witness in trying to help the respondent to evade its liability to the cargo owners, which was obviously the same motive which actuated his previous story, the Court erred in failing to disregard entirely his testimony as not entitled to credibility.

55. The Court erred in failing to hold that the reports made by the chief engineer of the "Galileo" to the respondent on July 2, 1926, and on August 28, 1926, and to Superintendent Engineer Brackenbury before the "Galileo" sailed from New York on this voyage, gave sufficient knowledge to the managing officers of the respondent as to the conditions

existing on the "Galileo", to make it negligent for them to send her to sea without instructions being given that careful examination be made of the coal on board.

56. The Court erred in failing to hold that the reports made by the chief engineer of the "Galileo" at the end of each voyage in Hull did not give sufficient notice to the owners of the "Galileo" to make it negligent for them to send the "Galileo" to sea in the condition in which she was when she sailed from New York on this voyage.

[fol. 764] 57. The Court erred in failing to hold that the cable order of August 20, 1926, from the managing officers of the respondent to their New York agent that the "Galileo" load 850 tons of coal in her bunkers, did not give any discretion to the chief engineer or master as to where the coal should be loaded or as to whether or not it should be loaded in this only available bunker which was already partly full of coal.

58. After finding that New York was one of the terminals of the line, the Court erred in failing to hold that the managing officers of the respondent were negligent in not having a marine superintendent at New York.

59. After finding that New York was one of the terminals of the line, the court erred in failing to hold that the managing officers of the respondent were negligent in not having a superintendent engineer at New York.

60. The Court erred in ignoring respondent's own evidence, Respondent's Exhibit D, the cable order of the managing officers of the respondent, that the 850 tons of additional coal for transference to the "Francesco" must be carried by the "Galileo" in her bunkers.

61. The Court erred in finding that the master and the chief engineer were the ones who decided to carry part of the additional coal in the 'tween deck temporary bunker.

62. The Court erred in finding that the owner of the "Galileo" had no notice that old coal remained in this temporary bunker.

[fol. 765] 63. The Court erred in finding that the managing officers of the respondent had no notice that this old coal in the temporary bunker had hot spots.

64. The Court erred in finding that the managing officers of the respondent had no notice that the new supply of coal would be put on top of the old coal in this temporary bunker.

65. The Court erred in failing to hold that the managing officers of the respondent were negligent in never having instructed the master or chief engineer of the "Galileo" not to load new coal on top of old coal.

66. The Court erred in holding that the respondent had previously given written instructions to its ship engineers (Exhibit G), including those on the "Galileo", to see that coal in a bunker was all cleaned out before new coal was added or, at least, put into such position that it would be used before the new coal.

67. The Court erred in assuming that Respondent's Exhibit G covered any situation excepting one in which a bunker became completely empty in ordinary course of consumption on board the "Galileo".

68. The Court erred in assuming that Respondent's Exhibit G gave no instructions whatever to the chief engineer of the "Galileo" with respect to whether or not new coal should be loaded on old.

69. The Court erred in assuming that Respondent's Exhibit G covered anything excepting the permanent bunkers on the "Galileo".

[fol. 766] 70. The Court erred in assuming that Respondent's Exhibit G applied to the unusual excessive coal conditions on the "Galileo" at the beginning of this voyage.

71. The Court erred in failing to hold that the special cable order of the respondent of August 20, 1926, Respondent's Exhibit D, superseded Respondent's Exhibit G.

72. The Court erred in failing to hold that respondent had failed to introduce any evidence that the instructions contained in Respondent's Exhibit G were actually complied with at any time by the chief engineer of the "Galileo" or the chief engineers of other of its vessels, or that any

effort had been made by the respondent to see that they already complied with such instructions.

73. The Court erred in failing to find that the managing officers of the respondent had reasonable ground for believing that some old coal was in all of the bunkers when they issued the order that additional coal for the "Francesco" be loaded in those bunkers.

74. The Court erred in failing to find that the managing officers of the respondent were negligent in not ordering or authorizing the removal of the old coal in the bunkers at the time the cable order was issued to load the new coal.

75. After finding that putting a new supply of coal on top of an old pile ordinarily entails some danger, the Court erred in failing to find that the managing officers of the respondent were negligent in ordering a new supply of coal [fol. 767] to be loaded in the bunkers without issuing instructions that the old coal be first removed or authorizing the expense of doing so.

76. The Court erred in failing to hold that the managing officers of the respondent were negligent in not issuing instructions to the chief engineer, chief officer or other officers of the "Galileo" that the wooden bulkhead or bulkheads at the ends of coal bunkers be made as air-tight as practically possible.

77. The Court erred in failing to find that the respondent was bound by the testimony of the chief engineer and the chief officer that no efforts whatever were made to make the wooden bulkhead or bulkheads of this temporary coal bunker airtight.

78. The Court erred in failing to find that the managing officers of the respondent were negligent in failing to instruct the officers of the "Galileo" that reasonable efforts be made to make the wooden bulkheads in the temporary coal bunkers airtight up as high as the mass of coal.

79. The Court erred in failing to find that air passing through the wooden bulkhead into the mass of coal would oxidize not only the coal piled against the bulkhead but all the coal anywhere in the bunker past which the air current

would flow in its course through the mass of coal until it reached the top.

80. The Court erred in failing to find that two ventilators, both at the same end of a large rectangular coal bunker, taken in connection with a leaky wooden bulkhead [fol. 768] at the other end permitting air to pass in small currents through the mass of the coal, constituted usual, proper or safe ventilation.

81. The Court erred in assuming that the safety of the system of two ventilators at one end depended solely on whether or not it was sufficient to properly ventilate the surface of the mass and did not depend on and was not affected by the air currents which such a ventilation system would tend to set up between such ventilators and crevices in the wooden bulkhead at the other end.

82. The Court erred in failing to find that the respondent's witnesses conceded that many wooden bulkheads on other vessels were much more air-tight than this forward wooden bulkhead on No. 3 'tween deck bunker in the "Galileo", and that at nominal expense this wooden bulkhead could have been made much more safe and airtight than it was by means of dovetailing or overlapping the planking or by adding a layer of heavy paper of substantially airtight cloth.

83. The Court erred in failing to draw a distinction between the inconsiderable quantity of air which would flow through a properly constructed wooden bulkhead and the larger and unsafe quantity of air which flowed through this forward wooden bulkhead in No. 3 'tween deck reserve bunker which was concededly erected with no thought or care whatever for making it substantially airtight.

84. The Court erred in overlooking and failing to mention the evidence, including that of respondent's witnesses, [fol. 769] that wooden bulkheads on many ships are so constructed as to be much more airtight and safe than this forward wooden bulkhead in No. 3 'tween deck reserve bunker on the "Galileo".

85. After finding that the danger arising from the inferior ventilation of coal through the bunker wall is ordi-

narily obviated by inspecting it from time to time and removing such parts as have become hot, the Court erred in failing to find that the managing officers of the respondent were negligent in not instructing a marine surveyor, shore representative and/or the chief engineer to make such inspection and removals.

86. After finding that precautions of inspection have to be increased in the case of less-safe bunkers such as this temporary one on the "Galileo", the Court erred in failing to find that the managing officers of the respondent were negligent in not issuing instructions to a marine surveyor, shore representative or the chief engineer that such increased precautions should be taken and authorizing the expense thereof.

87. After finding that the fire and loss of cargo resulted from the hot spots in the old coal and loading of the new coal before sailing from New York, the Court erred in failing to draw the obvious inference that the air or oxygen which permitted the continuance of the oxidation to ignition point consisted of the air currents flowing through the crevices in the defective forward wooden bulkhead into and through the mass of the coal.

[fol. 770] 88. After finding that other methods might have been adopted which would have been slightly more effective in excluding air from passing through this forward wooden bulkhead such as by two thicknesses of overlapping planks or by paper pasted over the crevices, or by caulking, the Court erred in failing to find that the failure of the shipowner to authorize or issue instructions regarding the use of this simple and cheap means of fire prevention constituted negligence.

89. The Court erred in failing to find that the respondent's witness Heck, Senior Engineer Surveyor for Lloyd's Registry in New York, conceded that this wooden bulkhead could easily and cheaply be made much safer than it was.

90. The Court erred in announcing and applying the novel and dangerous doctrine that a ship-owner who carelessly fails to maintain a shore organization at one of the vessel's two principal loading and terminal ports for the purpose of superintending the maintenance of her seaworthiness up to

the time of sailing is under a less duty under any contract of affreightment to the shippers of cargoes at that port than is a careful ship-owner who does maintain a shore organization at the vessel's principal loading and terminal ports to superintend the maintenance of her seaworthiness.

91. After finding that the heated condition of part of the old coal was necessary as a co-operating factor with the loading of the new supply as causing the fire, the Court erred in failing to draw the inference that the heated con-
[fol. 771] dition of part of the coal was a contributing cause of the fire.

92. The Court erred in failing to find that the managing officers of the respondent were negligent in entrusting the loading of the new supply of coal to an independent stevedoring company without instructions or authority to incur necessary expense in first removing any dangerous old coal.

93. The Court erred in failing to find that the managing officers of the respondent were negligent in definitely instructing their New York representative and the stevedoring company that the new coal must be loaded in the bunkers, and without issuing instructions or giving authority to them or to anyone to incur any expense necessary in first making the bunkers safe for the new supply by removing any dangerous old coal, or in constructing a safer type of wooden bulkhead.

94. The Court erred in failing to find that if the respondent had constructed a more airtight form of wooden bulkhead the entry of air into the mass of the coal would have been stopped and a fire prevented notwithstanding any negligent act of the chief engineer in loading new coal on old coal.

95. The Court erred in failing to find that if the managing officers of the respondent had issued instructions that the emasculated and peculiarly one-ended form of surface ventilators be planked off, the flow of air through the mass
[fol. 772] of this coal would have been stopped and a fire prevented notwithstanding any negligent act of the chief engineer in loading new coal on old coal.

96. The Court erred in failing to find that the managing officers of the respondent were negligent in not complying

with the British Board of Trade's instructions that on a British steamer such as the "Galileo", the flow of air must be prevented through the mass of coal in the bunkers.

97. The Court erred in failing to find that the managing officers of the respondent were negligent in not having surface ventilators at both ends of the temporary coal bunker in No. 3 'tween deck, and in substituting for it an emasculated and one-ended form of surface ventilation which tended to create a draft between the one-ended ventilators and the defects or crevices in the wooden bulkhead at the other end of the bunker.

98. The Court erred in failing to find that the fact that the old coal was in heated condition showed that the crevices in the wooden bulkhead were so large as to be dangerous and tend to cause fire.

99. The Court erred in assuming, without evidence, that if the wooden bulkhead had been made as airtight as it could have easily and cheaply been made, the loading of a new supply of coal would have caused a fire.

100. The Court erred in failing to find that it was the new coal which had been loaded by Magarelli before he ever con- [fol. 773] sulted the chief engineer of the "Galileo" which caused the fire and loss of cargo, and not the remaining coal which was loaded afterwards.

101. The Court erred in failing to find that the chief engineer of the "Galileo" testified that Magarelli came to him and told him that the coal was hot to his feet and that the chief engineer brushed him aside and told him to go about his business, and that he, the chief engineer, had no time to pay attention to him.

102. The Court erred in failing to find that the cause of the fire and loss of cargo was not the mere failure of the chief engineer of the "Galileo" to pay any attention to Magarelli, but was the cable instruction of the managing officers of the respondent that the new coal be loaded on the "Galileo" in her bunkers, and the act of Magarelli in loading it in her bunkers.

103. The Court erred in finding that the mere fact that Magarelli happened to stop for a minute and complain to

Oxtoby and be ignored made Oxtoby's action the cause of the fire rather than the preceding action of Magarelli in loading part of the new coal on the old heated coal and his later action in loading the remainder on the heated coal pursuant to instructions from the managing officers of the respondent to their New York agent that such new coal must be loaded on the "Galileo" in her bunkers.

104. After finding that hot spots were of common occurrence in all types of bunkers and were to be expected and [fol. 774] guarded against before new coal was added, the Court erred in failing to find that the managing officers of the respondent were negligent in issuing an arbitrary cable order that all the new large quantity of coal must be loaded on the "Galileo" in her bunkers without qualifying the order by saying that the loading need not be done if there was old coal in the bunkers or if the old coal had hot spots, or authorizing any unnecessary expense in first removing the old coal and thus depriving the "Galileo" of part of her normal supply of bunkers.

105. The Court erred in finding that it was within the ordinary scope of the duties of the chief engineer of the "Galileo" to deprive the "Galileo" of part of her normal supply of bunkers by removing the remaining 160 tons in this temporary bunker therefrom and filling it up with coal intended for another vessel in a case in which the managing officers of the respondent had given no authority that any of the new coal should be available for use by the "Galileo" herself.

106. After finding that the negligent act of the engineer in loading a new supply on the hot coal caused the "Galileo" to become unseaworthy, the Court erred in failing to find that the managing officers of the respondent were negligent in ordering her to sea in such unseaworthy condition without instructions having been given that inspection should be made of her to determine whether or not she was seaworthy.

107. The Court erred in failing to find the fact which was conceded in counsel for respondent's brief at the trial that it was the heat in the coal which Chief Engineer Ox- [fol. 775] toby of the "Galileo" was told about by the stevedore Magarelli and which he deliberately disregarded which

caused the loss of the ship, and that it was the temperature of the old coal which Oxtoby knew about which caused the loss here, and that the fire would have been caused in any event by the fact that the coal remaining in the bunker, whatever its age, was hot.

108. The Court erred in failing to hold that it is no defense for a shipowner under the Fire Statute to show that his servant's negligence was a contributing cause of the fire.

109. The Court erred in failing to find that at the time this cargo was shipped it was common knowledge among shipowners and persons in the shipping business that it was unsafe and tended toward spontaneous combustion and fire to use a wooden bulkhead for confining coal, which bulkhead was not as airtight as reasonable efforts could make it; and that reasonable and usual efforts could on the evidence in the present case have made this bulkhead on the "Galileo" substantially more airtight and thus have absolutely prevented a fire; and that the respondent was negligent in not having issued any instructions to the master or officers of the "Galileo" with reference to the known danger in using a wooden bulkhead in a coal compartment unless all reasonable efforts had been made to make it airtight.

110. The Court erred in failing to find that all the witnesses from the "Galileo" conceded that they had received [fol. 776] no instructions whatever from the respondent with reference to making the wooden bulkhead airtight, and that they made no effort whatever to make it airtight.

111. The Court erred in failing to find that it was the action of pier superintendent Hicks and of stevedore Magarelli and his gang acting under personal instructions from the managing owners of the "Galileo" at Hull which caused the fire.

112. The Court erred in holding that the respondent did in fact delegate to the chief engineer or the master any duty of supervision over the execution of the order issued by the managing owner of the respondent to the respondent's New York shore agent and re-delegated by them to pier superintendent Hicks and stevedore Magarelli.

113. The Court erred in failing to hold that the respondent was personally responsible for the negligence of stevedore Magarelli in loading new coal on old in view of the fact that Magarelli was employed by and received his instructions solely from the respondent's New York shore agent, Mr. Sanderson, and who in turn received his instructions directly from the managing owners of the respondent at Hull.

114. The Court erred in failing to find that the managing owners of the respondent cabled instructions that the 850 tons to be carried to Hull for transfer to "Francisco" must be carried on the "Galileo" in her bunkers.

115. The Court erred in failing to find that the only bunker on the "Galileo" which was available for the car-
[fol. 777] riage of this coal was the No. 3 'tween deck reserve bunker in which the coal was actually loaded and which already had 160 tons of old coal in it.

116. The Court erred in failing to find that there was no reasonable or possible way in which those on the "Galileo" could comply with the managing owners' specific direction that the coal be carried in the bunkers, excepting by loading it on top of the 160 tons or in the only partially filled bunker.

117. The Court erred in failing to find that the stevedore Magarelli received all his orders and his compensation from the Jarka Company and Pier Superintendent Hicks, and that the only occasion on which Magarelli ever saw Chief Engineer Oxtoby was when Oxtoby happened to be on the deck as Magarelli climbed out of the hot bunker and the chance conversation between the two men occurred.

118. The Court erred in failing to find that it was stevedore Magarelli's negligent actions which caused the fire and that he was employed and paid to perform those actions by Pier Superintendent Hicks on personal instructions by cable from the managing owners of the respondent at Hull.

119. The Court erred in failing to hold that it was not the chief engineer of the "Galileo" who negligently loaded the excess "Francisco" coal, but that it was Magarelli acting under orders from Hicks, the pier superintendent,

who received his orders from Sanderson who was the [fol. 778] manager of the respondent's New York representative and who had received the arbitrary special order by cable directly from the managing owner of the respondent at Hull that the 850 tons be loaded on the "Galileo" in her bunkers.

120. The Court erred in failing to find that the managing owner of the "Galileo" at Hull ordered its New York shore agent by cable that the 850 tons of coal, for carriage to Hull for the "Francisco" be loaded on the "Galileo" in her bunkers; that the shore agent through Hicks, its Pier Superintendent, asked the master of the vessel what bunkers space was available in which to stow that coal shipment and that the master, after conferring with the chief engineer, reported that the only bunker space available was the No. 3 'tween deck reserve bunker in which the coal was actually loaded.

121. The Court erred in failing to find that it was the personal negligence of the managing owners of the "Galileo" at Hull which caused this fire because if they had not arbitrarily directed that the 850 tons for the "Francisco" be carried on the "Galileo" in her bunkers the coal would undoubtedly have been carried in the ordinary and usual manner as cargo in a cargo hold.

122. The Court erred in holding that the Fire Statute relieves the shipowner from liability on the warranty (both expressed in the contract of affreightment, and implied if such express warranty were absent), that due diligence would in fact be used by the shipowner and by all the vessel's officers up to the instant of sailing to make the vessel seaworthy.

[fol. 779] 123. The Court erred in not finding that the respondent had failed to establish that an unavoidable fire was the dominant cause of the damage.

124. The Court erred in failing to find that the evidence was at least as consistent with the dominant cause of damage being unseaworthiness which due diligence to make seaworthy would have prevented, as with the cause of damage being an unavoidable fire, and that therefore the respondent had failed to bring the case within the Fire Statute.

125. The Court erred in failing to find that Ellerman's Wilson Line of New York, Inc., was the managing and general representative of the respondent in connection with the operation of its liners at one of its two principal terminal ports, and that that corporation as such representative was required to use due diligence to make the "Galileo" seaworthy on sailing, and that its negligence was personal negligence of one of the managing officers of the respondent.

Bigham, Englar, Jones & Houston, Proctors for Earle & Stoddart, Inc., et als., Libellants, No. 64 Wall Street, New York City.

[fol. 780] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto, that the libellants' exhibits and respondent's exhibits which are not included in the record herein, or not included in full in the record herein, need not be reproduced in the record on appeal but may be transmitted to the Circuit Court of Appeals in their original form and may be used by either party at the argument of said appeal with the same force and effect as if said exhibits were included in the foregoing transcript of record. The following exhibits are therefore to be transmitted to the Circuit Court of Appeals in their original form and are not included, or are not included in full in the printed record on appeal:

Libellants' Exhibit 16. Printed pamphlet issued by Lloyd's in May, 1912, containing report by Chief Engineer Surveyor Milton on spontaneous combustion of coal. Only [fol. 781] pages 16 and 17, entitled "General Conclusions", being printed in record. Remainder of pamphlet not being printed.

Libellants' Exhibit 17. Official instructions issued by British Board of Trade, Marine Department, December, 1922, to Surveyors on Surface Ventilation of Coal Cargoes,

published by his Majesty's Stationery's Office. Only pages 1, 2 and the first part of page 3 up to paragraph numbered 6, being printed in the record. Remainder of pamphlet not being printed.

Libellants' Exhibit 19. Pamphlet by H. H. Stoek on Fire in Steamship Bunker and Cargo Coal, issued in 1923 by Government Printing Office, Washington. Not being printed in record.

Libellants' Exhibit 26. Lloyd's Calendar, 1926, issued by Lloyd's, London; title pages to be printed in the record, and also pages 267 to 269, relating to ventilation and risks of spontaneous combustion in bunkers and coal cargoes. The remainder of the book not to be printed.

Libellants' Exhibit 28. Pamphlet by O. P. Hood on Factors in the Spontaneous Combustion of Coal, issued in 1922 by Government Printing Office, Washington. Not being printed in the record.

Libellants' Exhibit 29. There is no Libellants' Exhibit 29. The Clerk inadvertently gave this number to the respondent's exhibit (Chief Engineer Oxtoby's voyage report) which was introduced by the respondent as "Exhibit 29" and is being printed in the record with respondent's exhibits.

[fol. 782] Respondent's Exhibit A. Mate's Log Book of "Galileo" covering period May 15, 1926, to August 22, 1926. The page containing entries August 19th to 22nd, 1926, to be included in printed record. Remainder not to be printed.

Respondent's Exhibit H. For identification, affidavit of Oxtoby re Margarelli story. Not supplied by Kirlin, Campbell, Hickox, Keating & McGrann, and, therefore, not being printed in the record.

Respondent's Exhibit J. Manifest of "Galileo" cargo for June, 1926, voyage. Not to be printed in the record.

Respondent's Exhibit L. Manifest of "Galileo" cargo for August, 1926, voyage. Not to be printed in the record.

Dated New York, June 29, 1931.

Bigham, Englar, Jones & Houston, Proctors for Libellants. Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Respondent.

[fol. 783] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York, June 29, 1931.

Bigham, Englar, Jones & Houston, Attorneys for the Libellants. Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for the Respondent.

[fols. 784-784b] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 785] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

EARLE & STODDART, INC., et al., Libellants,

against

ELLERMAN'S WILSON LINE, LTD., Respondent

DEPOSITION OF JOHN J. CHAPMAN

Deposition Taken on Behalf of the Respondent, at the Office of Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, No. 27 William Street, New York City, 11 a. m. March 27, 1929

Appearances:

Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating (Mr. Keating and Mr. Herbert) for the respondent.

Messrs. Bigham, Englar, Jones & Houston (Mr. Jones and Mr. Nunnally) for the libellants.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable.

JOHN J. CHAPMAN, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Keating:

Q. Mr. Chapman, are you a licensed chief engineer?

A. Yes, sir.

[fol. 786] Q. How long have you held a chief engineer's license?

A. About 20 years.

Q. How long have you been going to sea as an engineer?

A. About 13 years.

Q. How long have you been going to sea altogether as an engineer of any kind?

A. 31 years.

Q. Is that all with one company?

A. All with the Ellerman's Wilson Line, yes, sir.

Q. These certificates are from the British Board of Trade, are they.

A. From the British Board of Trade, yes, sir.

Q. You are at present chief officer of what vessel?

A. The "Marengo".

Q. That is an Ellerman's Wilson Line boat?

A. Ellerman's Wilson Line boat.

Q. Do you remember arriving in New York on the "Marengo" on or about September 26, 1926?

A. Yes, sir, I remember.

Q. You had arrived from Hull, had you?

A. Hull, yes, sir.

Q. Do you remember how much coal you had on board at that time, or can you refer to something which gives you the details?

Mr. Jones: Objected to, unless the testimony is shown to be relevant.

A. About 280 tons, as near as I can say.

Q. The voyage on which you sailed from New York was voyage No. 88, was it?

A. I couldn't say the exact number of the voyage, but it would be about that. The last voyage was the 100th voyage.

Q. I show you a document, and ask you whether your signature is appended to that?

A. Yes, that is my signature and these are my figures.

This writing is a clerk's on the dock.

[fol. 787] Q. What is that document, Chief?

A. Well, this states the coal we had when we arrived, and the coal we loaded here, and the coal we shifted into the permanent bunkers here, and the coal we consumed while we were in New York, and the coal we had leaving.

Mr. Keating: I offer the document in evidence.

(It is marked Respondent's Exhibit A.)

Mr. Jones: The same objection as to relevancy to all this testimony. That may be understood?

Mr. Keating: Yes.

(It is stipulated that the objection need not be repeated.)

Q. Where was the old coal?

A. Well, the greater part of the old coal would be in the lower cross bunker.

Q. That is in the lower hold, is it?

A. That is in the lower hold of the ship.

Q. That is one of the regular cross bunkers?

A. That is a cross bunker—permanent—permanent bunker of the ship—and there may have been some in the cross bunker 'tween deck, and there may have been some in the cross bunker No. 3 cargo space—about 75 tons.

Q. Before loading the new coal, did you do anything with the 75 tons of old coal that was in the 'tween decks?

A. Yes, we had that 75 tons of coal all put in the lower cross bunker.

Q. At New York?

A. At New York.

Q. In other words, you shifted it here?

A. We shifted it here—the shore people shifted it.

[fol. 788] Q. Upon your order?

A. Yes, sir.

Q. Before you loaded the new coal, did you do anything with the other coal spaces on the ship?

A. Yes, we went all around them and saw everything was all properly cleaned up and all ready to receive the new coal—all swept out and everything else.

Q. You saw that yourself?

A. I saw that myself.

Q. How much new coal did you take at New York? You can refer to your logbook if you wish, Chief.

—. Somewhere about 2,000 tons, I think.

Q. Look and give us the exact number.

A. 2,122 tons, received from Berwind White Coal Company.

Q. That was supplied by whom?

A. By the Berwind White Coal Company.

Q. Did you see it go aboard?

A. Yes, I saw it, I tallied it all on board.

Q. How did it go on board?

A. It comes alongside in craft—in barges—and they heave it up with the winch, and they put it where you want it, and you trim it away in the different spaces.

Q. Where did you put that new coal?

A. All the permanent bunkers would be filled up, made solid, and then there was coal put into No. 3 shelterdeck, No. 3 'tween deck and No. 3 lower hold.

Q. Did you have a fire after you left New York in any of your coal?

A. Yes.

Q. What was the date on which you discovered the fire?

A. (Referring to log.) The 11th of October.

Q. Where was the fire, Chief?

A. It was in the cross bunker 'tween decks.

Q. Whereabouts?

A. On the starboard side, forward part of it.

[fol. 789] Q. I show you a plan of the "Marengo", and ask you to mark with a cross on this plan the point where the fire was?

(Witness does as requested.)

Mr. Keating: I offer the plan in evidence.

(It is marked Respondent's Exhibit B.)

Q. Right at the point w-ere you marked a cross, Chief, there is a line. What is that line?

A. Well, that is a bulkhead.

Q. Is that a wooden bulkhead?

A. That is a steel bulkhead in the center, and in each wing it is a wood bulkhead, both in this deck and in this shelterdeck.

Q. I mark on here "W W". Will you tell us what "W W" consists of?

A. Consists of a wooden bulkhead in the wings and a steel bulkhead in the center.

Q. Was the fire forward or aft of that bulkhead "W W"?

A. It was aft.

Q. Right at the bulkhead, was it?

A. Yes, at the bulkhead.

Q. Will you look at Respondent's Exhibit B, and tell us what is forward of the bulkhead marked "W W"?

A. Well, at this time we were carrying an extra lot of coal, it was during the coal strike in England, and we had to take sufficient coal at New York to bring us back to New York, and of course the permanent bunkers wouldn't hold all that, so we put so much in the 'tweendeck, No. 3 'tweendeck and so much in the shelterdeck, taken off in the bunkers to put this bunker coal in. I can't say exactly how it is on there (indicating Respondent's Exhibit B), from this bulk-[fol. 790] head "W W" to the fore part of the coal here it was 26 feet.

Q. That point was filled with coal?

A. That was full of coal, from this line we have marked there——

Q. Let's mark that line "B B". Now, what is this line "B B" marked on that Respondent's Exhibit B?

A. That is the wood bulkhead where the coal extends from the cross bunker bulkhead.

Q. That is from bulkhead "W W" to bulkhead "B B" was a space filled with coal?

A. That is right, a space of 26 feet.

Q. Entirely filled with coal, was it?

A. Entirely filled with coal.

Q. Was that new coal or old coal?

A. That was all new coal of Berwind White's. That was put in that voyage in New York.

Q. There was also coal aft of the bulkhead marked "W W", was there?

A. Oh, yes. That is the permanent bunker, and this is the permanent bunker. There was coal right along here up to that bulkhead at that time. It is marked on this drawing here——

Q. Let's mark it "C C".

A. That is now marked on there "Refrigerating Machinery". That space was taken off of this "Refrigerating Machinery" space some later time after the fire occurred.

Q. In other words, the coal extended aft to the bulkhead "C C"?

A. Yes.

Q. Now, the point that I have my pencil resting on—is that a permanent bunker?

A. That is a permanent bunker.

Q. We will mark that "P". Now, was that new or old coal?

A. That was new coal. All the old coal we had was in this lower cross bunker.

Q. We will mark that "A". All the old coal was in the [fol. 791] cross bunker in the lower hold marked "A"?

A. That is right.

Q. Before you loaded new coal, what had you done to the spaces between bulkhead "B B" and bulkhead "C C"?

A. Well, we had it all properly cleaned up to receive this new coal.

Q. Was it all clean-swept?

A. It was all clean-swept, the whole lot.

Q. There was no old coal in there at all?

A. No. All the old coal we had was in this cross bunker marked "A".

Q. What did you do about the fire? Will you look at the logbook and give us the details of the fire?

A. (Referring to log.) On the 11th of October, 1926, smoke found its way from cross bunker 'tweendecks at 9 A. M. Side pockets shut down and all coal worked from the cross bunker. At ordinary times this cross bunker, it only feeds three fires, and the side bunkers feed each wing boiler, three fires in each wing boiler, but to get this coal worked up quicker, we shut down the sides and took everything from the center, so we could get to where this smoke was coming from. In other words, we burned nine fires from there instead of three.

Q. Did you eventually get to the fire?

A. Yes, we worked all that day, the nine fires, and we worked the next day, and we located the fire, where the smoke was coming from, on the 12th of October, that is the next day on the 8 to 12 watch.

Q. And where was it, Chief?

A. It was on the starboard side 'tweendeck bunker.

Q. Did you eventually get right to the point of the fire?

A. Yes, we kept working all the nine fires from there,

and then we got the sailors in with our own men, and we [fol. 792] shifted the coal from the sides into the middle, from the 'tweendecks where this smoke was coming from, and then on the 14th at 9 o'clock in the morning we put steam on the fore deck and we jettisoned 40 tons of coal, put it over the side, and that was the live coal, that was the live fire.

Q. You actually got to the exact spot?

A. Yes.

Q. And where was that exact spot?

A. That exact spot that I mark "X" on the plan (Respondent's Exhibit B).

Q. Was the wooden bulkhead burned at all?

A. Yes, the wooden bulkhead was burned at the bottom, about 4 feet up.

Q. And did the fire extend forward from "X"?

A. Yes, it went each side of the bulkhead, of course being a wooden bulkhead, the bulkhead had fired, and it extended about, I should say, 3 feet on the forward side of the bulkhead.

Q. Was that fire on the steel deck?

A. On the steel deck, yes.

Q. Was there any evidences of fire or heat down in the lower hold?

A. No, not in the lower bunker.

Q. Did you have any other fire in that coal?

A. Yes, we had a slight fire on the port side in practically the same place on the port side.

Q. What do you mean by the same place on the port side —directly opposite?

A. Yes, directly opposite, on this 'tweendeck at the bulkhead on the port side. This fire where we jettisoned the coal was on the starboard side, and we had some hot coal on the port side but we didn't have to jettison any of that, it wasn't so serious as the starboard side.

Q. And you eventually got to that, too?

A. We eventually got that out, heated.

[fol. 793] Q. Forward of bulkhead marked "B B" on the plan, was there cargo?

A. Yes, this was cargo along here (indicating).

Q. And between that cargo and the fire was this 26 feet of coal between bulkheads "B B" and "W W"?

A. Yes. As I say, this fire extended about 3 feet along here.

Q. 3 feet forward of bulkhead "W W"?

A. Yes.

Q. Who selected the place for the coal—the new coal?

A. The captain and myself.

Q. Did the shore people have anything to do with that?

A. No, they had nothing whatever to do with it, we did it ourselves, we had this coal to take, and we measured the distance off and then we bulkheaded it off and put the coal in there.

Q. Why did you have to take this extra coal?

A. On account of this coal strike in England, we couldn't bunker in England.

Q. You had to take coal for the round?

A. We had to take coal in New York to bring us back to New York.

Q. Did you have any general instructions from your owners about the care of coal?

A. We use our own discretion and look at the coal, if it wants moving we have it moved.

Q. What has your practice been about that?

A. Well, you watch the coal and you see there is any signs of its heating, you get it moved.

Q. Do you work out the old coal first?

A. Oh, yes.

Q. Well, now, did you—you actually did shift—why did you shift this 75 tons of old coal from the 'tweendecks?

A. We put that all in the lower bunkers so that we should have a clear space for the new coal.

[fol. 794] Q. You work out of the cross bunker first, do you?

A. Yes.

Q. How long had what we have been calling the old coal been in the ship?

A. I couldn't say.

Q. Was it American coal?

A. Well, it would be a mixture of English and American coal.

Q. You don't know how long it had been there?

A. No, I couldn't say how long it had been in the ship.

Q. But it had been there a long time?

A. It had been there all of 5 months—I couldn't say.

Q. What was the cause of the fire in the new coal?

A. The only thing I could put it down to was spontaneous combustion.

Q. Can you think of anything else?

A. Nothing that I know of.

Q. Chief, I notice in this Respondent's Exhibit B, that the capacity of some of the spaces at least is marked in tons of coal. Is that English coal or American coal?

A. That is English coal on that drawing. On that drawing the spaces are marked 50 cubic feet to the ton, but with American coal you can only run about 40 cubic feet in a ton, so consequently you get much more American coal in the space than you would English coal.

Q. About 20% more coal?

A. Yes, about 20% more coal, I would say about that.

Q. You have produced here your logbook for the voyage in question, Chief?

A. Yes.

Mr. Keating: I ask that the logbok be marked for identification.

(It is marked Respondent's Exhibit C for Identification.)

[fol. 795] Mr. Jones: The cross examination is without waiving my objection as to relevancy.

Cross-examination.

By Mr. Jones:

Q. I understood from you that there was a coal strike in England at the time that you have been testifying to?

A. That is so.

Q. Do you know when their strike began?

A. No, I should say it began—I think somewhere about May.

Q. That is your recollection?

A. Yes.

Q. That it began in May, 1926?

A. I think so, but I wouldn't swear to that.

Q. I also understood you to say that the cause of your carrying such a large quantity of coal was because of this coal strike?

A. That is right.

Q. It is not the usual practice for the Ellerman's Line ships, such as the "Marengo" and "Galileo" to carry this large quantity of coal?

A. No.

Q. It is quite an unusual situation you had to deal with?

A. That is so. In ordinary times we bunker in Hull to take the ship a round voyage back to Hull.

Q. And to take this type of coal in this quantity at New York was quite unusual for your line?

A. Yes.

Q. I also understood you to say that the coal which was shifted—the old coal which was shifted—was all shifted by shore people?

A. Yes.

Q. Whom do you mean by shore people?

A. The stevedores, they sent a gang on board and they shifted the coal.

Q. Where did you get those people—did you make an ap-
[fol. 796] plication to the shore superintendent for these men to come there and shift the coal?

A. No, it is an understood thing, if you will allow me to explain. Our bunkers, they do not hold sufficient coal to take the ship a round voyage. When we bunker in Hull there is so much coal put in the No. 3 lower hold, and every voyage when we get to New York that has to be shifted by the shore people into the permanent bunkers.

Q. That is permanent orders for the shore people to do that?

A. Yes.

Q. And these men come on board?

A. Yes.

Q. Under directions from your shore office to shift this coal?

A. Yes—well, it has always been the practice, as long as I have been on the ship, for these people to come on board.

Q. Who orders them to come on board?

A. I don't know. The coal has to be shifted, and they come on board and shift it, and always have done.

Q. That is part of the routine of your line?

A. Yes.

Q. And they are sent on board by somebody on shore, you don't know who?

A. They come on board every voyage to shift the coal.

Q. You don't know where they get the orders from to shift this coal?

A. No, I don't know where they get the orders from, they come down and shift it.

Q. And they shift that without saying anything to you? They come on board and report they come to shift the coal?

A. They come on board and they ask what coal there is to shift, and then I tell them the amount and they start in and shift this coal into the bunkers wherever I want it put in.

Q. You have told us about some fires that you had in the coal. That is not the only fire you had during that [fol. 797] summer?

A. No, we had a fire the voyage previous. You could hardly call it a fire, there was no jettisoning or anything of that sort.

Q. Let's see what your logbook says about that. I find an entry the 21st of August, 1926, "Coal in port shelterdeck very heated, engaged working it out."

A. Yes, that is right.

Q. Then I find an entry on the 23rd of August, "Engaged working coal out of port and starboard shelterdeck, assisted by deckhands."

A. Yes.

Q. Then I find an entry on the 24th of August, 1926, "Reached fire in port side shelterdeck 3 P. M." That is correct, isn't it?

A. That is correct.

Q. August 25th, "Reached fire on starboard side shelterdeck 1.30 P. M."

A. Yes, sir.

Q. Then on the 26th of August, I find this entry, "Coal still heated on port and starboard shelterdeck. Engaged working it out."

A. Yes, that is right.

Q. You made a report, I suppose, of that to your owners when you got here?

A. Well, no, we just—it wasn't a fire really—it was heated coal, and we tunneled down to it and used it up gradually.

Q. You want to be frank about this. On the 27th of August, 1926, a further entry, "Waste pipe case on port and starboard shelterdeck found on fire. Extinguished same." That was caused by that coal fire, wasn't it?

A. Yes, that is where the fire was.

Q. You reported about that waste pipe casing, didn't you, being burned?

A. Well, we had it renewed when we got home.

Q. And you reported to your company's offices?

A. Yes, we intended for the steam pipe wood casing to be renewed, and it was renewed.

[fol. 798] Q. And in order to get it renewed, you had to make a report of that fire, did you not?

A. Yes.

Q. What was the cause of that fire?

A. The same thing, I suppose.

Q. Spontaneous combustion?

A. I suppose so.

Q. Have your owners ever told you about the various warnings that have been given with respect to spontaneous combustion in coal, by Lloyd's and other agencies—have they ever given you any instructions about that?

A. No.

Q. What is the normal amount of coal that you would have on board leaving New York, provided there was no coal strike?

A. Provided there was no coal strike, we would have about 900 tons.

Q. Whom do you report to when you get to New York?

A. Well——

Q. What is the usual routine of your company when you come in?

A. I report to the captain what coal we have remaining.

Q. To whom do you make that report?

A. To the captain.

Q. Do you make any report—you have here, Respondent's Exhibit A, Ellerman's Wilson Line, New York, Inc., Pier foot of 7th Street, Hoboken, New Jersey, signed J. J. Chapman—that seems to be a memorandum that is filed away at the Ellerman's Wilson Line's office in Hoboken?

A. Yes.

Q. To whom do you hand this paper which you sign?

A. To the clerk on the pier.

Q. And when do you do that?

A. Just before the ship sails.

Q. When the ship comes in, do you report the amount of coal you have got on board, so you will know how much to order on shore?

A. I tell the captain the amount of coal we have on board, and how many days' coal we have.

[fol. 799] Q. To whom does he make his report ashore as to how much coal you are to receive?

A. I don't know who he makes his report to.

Q. You know he makes it to anybody?

A. Yes, we reckon to have 20 days' coal on board leaving New York.

Q. You know the danger of spontaneous combustion in coal, having had two fires yourself?

A. Yes.

Q. That is something that is commonly known—that coal is liable to spontaneous combustion, isn't it?

A. Yes.

Q. Now, I take it from what you have said to Mr. Keating that this space which is between the line which Mr. Keating marked "B B" and " WW" on Respondent's Exhibit B, was the space which you temporarily used for coal on this voyage?

A. That is so.

Q. And ordinarily that space is not used for coal?

A. That is cargo space.

Q. And it is only in case of emergency that that space is used for coal?

A. Only in case of carrying a large quantity—bunker her to come back.

Q. And the only time you ever used that space for carrying coal was during the coal strike?

A. Quite so.

Q. The "Galileo" was owned by the same people as the "Marengo"?

A. Yes.

Q. And you are still employed by that same company?

A. Yes.

Q. Do you have a scrap logbook as well as the smooth log?

A. No, we use a slate.

Q. You spoke of the shore people coming aboard to shift coal. How did that practice grow up, do you know?

A. I don't know, it was under way when I came in the ship—that is over six years ago.

[fol. 800] Q. Do they always shift all of the old coal out of the upper bunkers, down into the lower bunkers?

A. No, in ordinary times the coal we have to shift is in No. 3 lower hold.

Q. Where do they put that?

A. Into the permanent bunkers.

Q. In other words, you have coal in your cargo space?

A. Coming out, yes, on the outward passage.

Q. That is the lower hold?

A. The lower hold.

Q. And then you shift it out of the lower hold into the permanent bunkers?

A. Yes.

Q. How about the old coal you have in other bunkers what do you do with that? Do these people who come aboard shift that, too?

A. No, we don't have that shifted, not without you require it shifted. If you require it shifted you can have it shifted.

Q. This logbook doesn't go beyond the 18th of August. Did you have any heating of coal before the 18th of August?

A. Not that I remember.

Q. You don't remember about that?

A. I don't remember.

Q. Is there any log entry here with respect to the amount of coal which you had when you arrived in New York?

A. (Referring to log) Leaving Quarantine here on the 26th of September, remained at noon, 301.18 tons of coal. Arriving New York, 279 tons; total consumed since yesterday, 22.18 tons.

Q. Do you make an abstract of this logbook when you get to New York?

A. I make an abstract log out for the voyage from leaving Hull to getting back to Hull.

Q. To whom is that delivered?

A. That is delivered into our office—into the engineers' office when we get home.

[fol. 801] Mr. Keating: At Hull?

The Witness: At Hull.

Q. Do you make any report here?

A. In New York?

Q. Yes.

A. No.

Q. Except this one with respect to the coal (Respondent's Exhibit A)?

A. Yes.

Q. You apparently began loading your bunker coal on the 29th of September, 1926?

A. Yes.

Q. And you finished loading your bunker coal on the 1st of October, 1926?

A. Yes.

Q. And your ship sailed on the 9th of October, 1926?

A. Yes.

Q. Is that the usual practice, to take coal on about ten days or a fortnight before you sail?

A. No. We take it before they finish the cargo, so there is space alongside of the ship, so the coal barge alongside of the ship doesn't interfere with the cargo.

Q. The usual practice is to take the coal aboard before you finish with the cargo?

A. Before we finish loading the cargo, yes.

Q. Where did you get your last English coal, do you remember—you said your old coal was a mixture of American and English coal—where did you get your last English coal?

A. The voyage prior to the coal strike.

Q. That would be the voyage prior to May, 1926?

A. Yes. I am not saying the coal strike—I can't say when the coal strike started.

Q. I understand your testimony to be that you don't remember accurately the date when the coal strike started, that your impression or your recollection is that it began in May, 1926?

A. Yes.

Q. That you may be in error in that respect?

A. That is so.

[fol. 802] Q. And that the last English coal which you took, a part of which you still had in your bunkers, you got on the voyage before the strike broke out, whenever the strike broke out?

A. Yes.

Q. I have stated your testimony accurately?

A. Yes.

Redirect examination.

By Mr. Keating:

Q. Chief, do I understand that when there is no coal strike, during the period which you call ordinary times, that you fill your regular cross bunkers in Hull, and also carry in No. 3 lower hold some English coal?

A. That is so.

Q. And the purpose of taking the English coal in No. 3 lower hold is to use on the voyage home?

A. That is so.

Q. When you told Mr. Jones that it was an ordinary practice to have the people come on board to shift the coal, were you referring to the normal times when you had to have that coal in No. 3 shifted, in order to use in your bunkers?

A. Yes.

Q. What were you referring to?

A. I will just tell you the exact state of affairs. When you leave Hull, you take about 1600 tons of coal in this ship to bring you back again to Hull—that is in normal times without any coal strike. Our bunkers in this ship will hold about perhaps 1050 or 1100; well, the balance from that 1100 to the 1600 is put down in No. 3 lower hold, and when you get to New York, it is taken out of No. 3 lower hold and put in the permanent bunkers.

Q. Was that what you were referring to, when you said the shore people came on board?

A. Yes.

[fol. 803] Q. Were you referring to anything else—any other general practice?

A. No.

Q. Who was it, if anybody, in your company or on the ship that decided what other coal was to be shifted, if any, when the times were not normal?

A. I would decide that myself.

Q. And you would give orders to whom?

A. I could see the stevedore who shifts the coal and tell him we wanted it shifted.

Q. Would you tell him what coal you wanted shifted and where you wanted it shifted?

A. Yes.

Recross-examination.

By Mr. Jones:

Q. As I understood you, you made it quite plain to me that when these people came on board to shift this coal which you were carrying during the coal strike, and which was not English coal, you did not order them on board—they came on board in accordance with their usual practice?

A. During the coal strike there wouldn't be any coal to shift, because you would only have about 260 tons arriving here, and that would be in the cross bunker, and there would be no American coal to shift at that time. You only have this coal to shift when you have this 500 or 600 tons of coal from home to shift at normal times, and during this strike there wouldn't be any of that to shift, because you would only have 200 or 300 tons on board.

Q. You and I are talking at cross purposes. You told me that when your ship got here—I think it was in August or September, 1926—that you had some coal in the 'tween-decks, and that these people came aboard from the shore to shift the coal. Now, I asked you at that time who [fol. 804] ordered those people to come aboard, and you said you didn't know, that the people came aboard from shore?

A. Oh, I ordered them to shift this 75 tons of coal.

Q. That isn't the point, as to what you ordered them to do. I asked you who ordered those people aboard the ship, and you said they came aboard as a routine matter. Didn't you tell me that?

A. Yes.

Q. And that is true?

A. Yes.

Q. They came aboard as a routine matter to shift the coal?

A. Yes, but it wouldn't have been shifted if I hadn't wanted it shifted, it was up to me to want it shifted.

Mr. Jones: I move to strike that out as not responsive.

Q. I put the question again to you—isn't it a fact that these shore people came aboard your ship, the "Marengo", for the purpose of shifting coal, and that you did not order

those people to come aboard but they had received their orders from some shore person—isn't that true?

A. Yes, but I ordered this coal to be shifted.

Mr. Jones: I move to strike out the latter part of the answer and leave only the word "Yes" in.

Q. Another thing I want quite clear on the record—I think I understand it, but I don't want a mistake about it—when you carry English coal, you use the lower hold to store your coal in excess of the capacity of your permanent bunkers?

A. That is so.

Q. But when you carried this American coal, you used [fol. 805] the 'tweendecks for the purpose of storing your excess coal?

A. Yes.

Q. That is correct, is it?

A. Yes.

Q. Isn't it true also that for the purpose of carrying this American coal, a wooden bulkhead was built in the 'tweendecks in order to separate this excess coal from the cargo?

A. I don't know whether it was built or not, but it was there, I don't know whether it was built specially for the job or not.

Q. Ordinarily it is not there, is it?

A. Yes, I believe it is there normal times.

Q. You have a permanent wooden bulkhead in there?

A. I don't know, because that is cargo space, and I don't know a great deal about cargo space.

Q. This is supposed to be a plan of your ship (Respondent's Exhibit B), and looking at the plan I couldn't see any indication of a permanent bulkhead at the line "B B".

A. (Referring to Respondent's Exhibit B) I don't know whether there is a permanent bulkhead there or not, but I know when we had this fire there was a bulkhead there.

Q. And that bulkhead would be built there by shore people?

A. I suppose the ship's people would build it.

Q. Where would they get timber to build it?

A. I don't know where they would get timber to build it, I suppose the carpenter and sailors would build it.

Q. Do you carry that quantity of timber aboard ship?

A. We have a tremendous amount of timber on board.

Q. You have dunnage?
A. Yes.
Q. That is about all, isn't it?
A. Yes.
[fol. 806] Q. Don't you know this bulkhead was built by shore people?
A. I don't know—that is cargo space.
Q. You don't know one way or another?
A. No.

Redirect examination.

By Mr. Keating:

Q. When you talked about shore people coming aboard in normal times to shift coal, are you referring to the coal stevedores?
A. Yes.
Q. Are the people that load the coal that is going into the ship, different from the people that come on to shift the coal?
A. No.
Q. Well, when people come on board from the shore, whom are you referring to—the coal stevedores?
A. Yes.
Q. And those are the people that are going to load and trim the new coal that comes into the ship?
A. Yes.
Q. And they actually are on the ship when you see them, is that right?
A. They come on board the ship.
Q. And if you want anything done regarding any of the old coal, what do you do?
A. I see the foreman and tell him I want it shifted.
Q. You just go up to the foreman, who is there with the coal stevedores, and tell him what you want, is that right?
A. That is right.
Q. And with respect to this 75 tons that was shifted this time, is that what you did?
A. Yes.

[fol. 807] RESPONDENT'S EXHIBIT A

Memorandum

From Ellerman's Wilson Line, New York, Inc.

Pier, Foot of 7th Street Hoboken, N. J., to Marengo, Voy. 88

Coal on board on arrival	249 T	O. c
Coal loaded on board	2122 T	O. c
Coal shifted to bunkers	45 T	O. c
Coal consumed	68 T	12c.
Coal on board leaving	2332 T	8c.

J. J. Chapman, Chief Engineer.

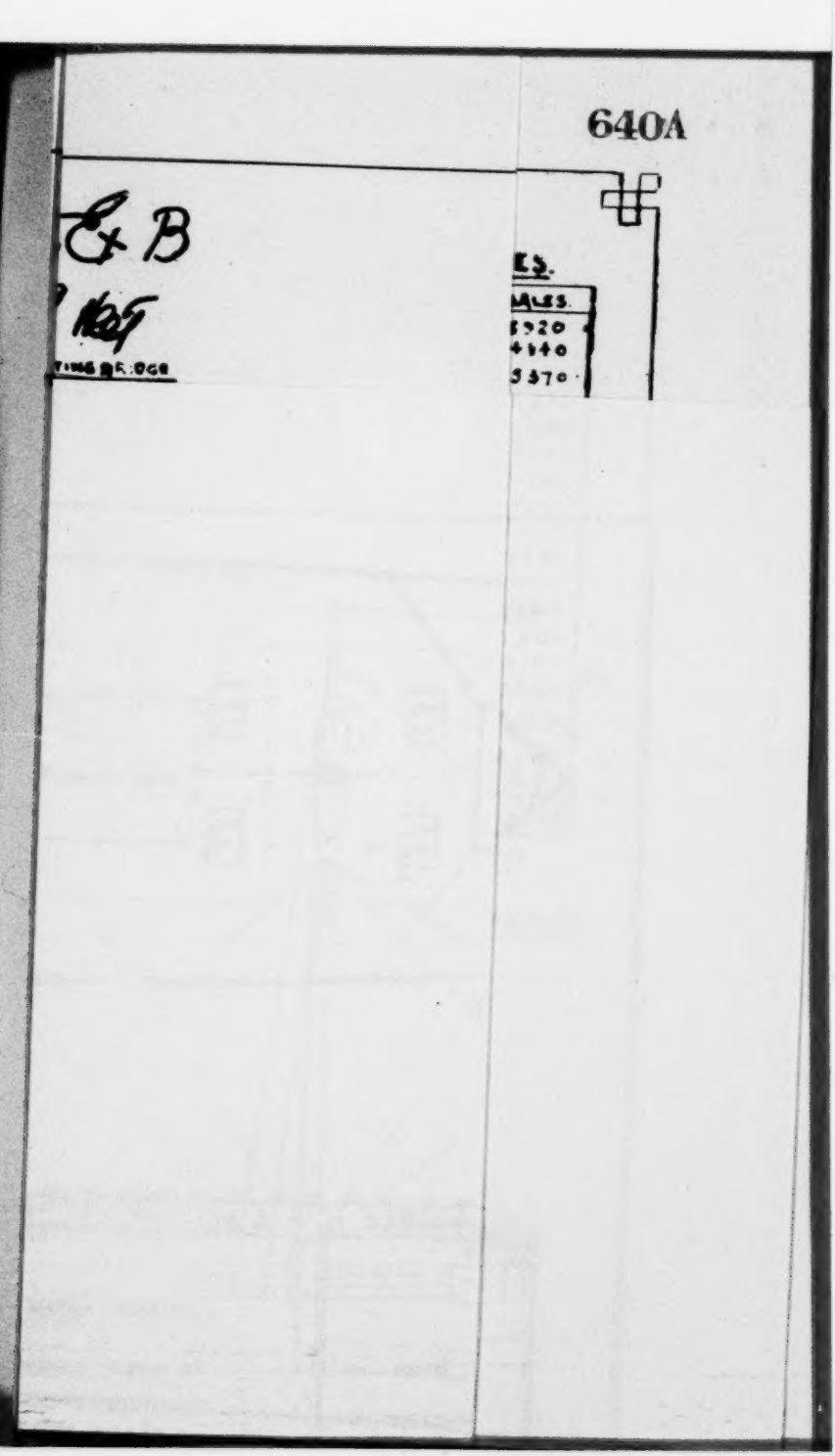
[fol. 808] RESPONDENT'S EXHIBIT B

Plan

(Photoprint)

FOLD OUT IS TOO LARGE TO BE FILMED

(Here follows Respondent's Exhibt B, side folio 809)


& B
KES.
MILES.
5920
4140
3370

[fol. 810] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EARLE & STODDART, INC., et al., Libellants-Appellants,

against

ELLERMAN'S WILSON LINE, LTD., Owner and Operator of the Steamship "Galileo", Respondent-Appellee

STIPULATION AS TO SUPPLEMENTAL RECORD

It is hereby stipulated and agreed that the foregoing supplemental record on appeal in the above entitled case may be filed in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit.

Dated New York, September 15th, 1931.

Bigham, Englar, Jones & Houston, Proctors for Libellants-Appellants. Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Respondent-Appellee.

[fol. 811] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EARLE & STODDART, INC., et al., Libellants-Appellants,

vs.

ELLERMAN'S WILSON LINE, LTD., Owner and Operator of the Steamship "Galileo," Respondent-Appellee

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Libel in personam in the admiralty by numerous cargo owners against Ellerman's Wilson Line, Ltd., for the loss of the libellants' goods by the burning and resultant sinking of the vessel upon which they were being carried. From

a final decree of dismissal the libellants appeal. Decree affirmed.

The opinion below is reported in 45 F. (2d) 231.

Bigham, Englar, Jones & Houston, Proctors for Appellants; T. Catesby Jones, James W. Ryan, Advocates.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Respondent-Appellee; Cletus Keating, James H. Herbert, Advocates.

OPINION

SWAN, Circuit Judge:

Ellerman's Wilson Line, Limited, a British corporation, [fol. 812] was the owner and operator of the steamship Galileo, which in August 1926 set out upon a voyage from New York to Hull, England, carrying the libellants' goods as cargo. Within six hours of her departure, fire was discovered in the coal carried in a temporary bunker in No. 3 'tween deck. The vessel immediately put about and returned to the Port of New York, where she subsequently sank, as a result of efforts to extinguish the fire, with a total loss of her cargo. The present suit charges a breach of contract in failing to deliver the cargo at destination, and the respondent pleads in defense the so-called fire statute (R. S. sec. 4282; 46 U. S. C. A. sec. 182), to which the bills of lading issued to the cargo owners expressly referred.

The parties agree that the fire was the proximate cause of the loss; and the district court has found that the fire was caused not by any neglect of the owner but by the gross negligence of the ship's chief engineer in putting new coal on top of old coal at a time when the old coal had become so hot in spots as to burn the boots of the trimmers, and after the chief engineer had been warned by the foreman of the coal trimmers of this condition. The new coal was taken on a day or two before the Galileo sailed, so that at the commencement of her voyage there existed within her, as the court expressly found, a condition so dangerous that a bunker fire was inevitable. Therefore, within authoritative definitions of seaworthiness (The Sylvia, 171 U. S. 462, 464; The Southwark, 191 U. S. 1, 9) the Galileo was unseaworthy when she sailed, and this was due

to her chief engineer's negligence. Under these circumstances, the libellants' contend, her owner may not claim exoneration from liability under the fire statute. This contention presents the main issue of this appeal.

[fol. 813] Section 4282 is in substance section 1 of the Limited Liability Act of March 3, 1851 (9 Stat. 635). It provides that no owner of a vessel shall be liable to make good any loss or damage to cargo caused by fire, "unless such fire is caused by the design or neglect of such owner". The phrase "neglect of such owner" means negligence of the owner personally, or, in the case of a corporate owner, negligence of its managing officers or agents, and it is perfectly clear under the authorities that negligence of the ship's officers in causing a fire is not to be imputed to the owner so as to deprive him of the statutory immunity. Walker v. The Transportation Co., 3 Wall. 150; Craig v. Continental Ins. Co., 141 U. S. 638, 646; Keene v. The Whistler, Fed. Cas. No. 7645 (D. Cal.); The Strathdon, 89 F. 374 (E. D. N. Y.); The Strathdon, 94 F. 206, aff'd, 101 F. 600 (C. C. A. 2). So far as we are advised, in all cases where exoneration from liability under the fire statute has been denied, there has been proof that the fire was due to the negligence of the owner himself or of some representatives of the owner other than the ship's officers and crew. Arkell & Douglas v United States, 13 F. (2d) 555 (C. C. A. 2); Bank Line v. Porter, 25 F. (2d) 843 (C. C. A. 4); Charbonnier v. United States, 45 F. (2d) 166 (E. D. S. C.), affirmed in 45 F. (2d) 174 (C. C. A. 4); Williams S. S. Co. v. Wilbur, 9 F. (2d) 622 (C. C. A. 9); Hines v. Butler, 278 F. 877 (C. C. A. 4); The Elizabeth Dantzler, 263 F. 596 (E. D. Va.).

Conceding this to be the law when the ship is seaworthy at the commencement of her voyage, the libellants contend that the rule is different when she sets out in an unseaworthy condition and due diligence has not been used by [fol. 814] the ship's officers to make her seaworthy. The libellants ask, in effect, that to the exception expressed in the statute—"unless such fire is caused by the design or neglect of the owner"—we add as a further exception "or unless such owner or his agents have failed to use due diligence to make the vessel seaworthy". There is no language in the Limited Liability Act to justify such a judicial amendment. The requirement of due diligence to make the

vessel seaworthy is expressly made a condition to claiming the benefits of the Harter Act (27 Stat. 445), and lack of diligence by any agent of the owner may be imputed to the owner. Int. Nav. Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218. But we find nothing in the Limited Liability Act which makes such diligence a condition precedent to the exoneration granted by section 4282. Nor can it be urged that the Harter Act has modified the former statute, for section 6 of the Harter Act expressly declares the contrary. (27 Stat. 446.)

Our statute was taken from an earlier British Act (26 Geo. III c. 86), as was pointed out in Norwich Ins. Co. v. Wright, 80 U. S. 104, 117, and the present British statute 57 and 58 Vict. c. 60, sec. 502, par. (i) is very similar to our own. Hence the construction put upon their statute by the British courts has a peculiar significance, additional to any weight to be accorded to the general desirability of uniformity in British and American law in matters maritime—a consideration noted in Queen Ins. Co. v. Globe & Rutgers Ins. Co., 263 U. S. 487, 493. Under the British law it seems to be well settled that a shipowner does not lose exemption from liability for loss by fire because the ship's [fol. 815] officers have failed to exercise due diligence to make the ship seaworthy when her voyage starts. Virginia-Carolina Chemical Co. v. Norfolk & North Am. S. S. Co. [1912] 1 K. B. 229; Ingram & Royle v. Services Maritime [1914] 1 K. B. 541; Tempus Shipping Co. v. Louis Dreyfus & Co., 40 Lloyd's L. L. 217, 219. The case of Royal Exchange v. Kingsley Nav. Co., Ltd., 1923 A. C. 235 construing the Canadian Act is distinguishable both on the facts and on differences in the statutes. It is more like the Harter Act than the fire statute, and the last sentence of paragraph 7 requires that the loss shall arise not only without "actual fault or privity" of the owners but also "without the fault or neglect of their agents, servants or employees."

The libellants argue that whatever the British law may be, our decision must be rendered in their favor because of The Malcolm Baxter, Jr., 277 U. S. 323. While the fire statute was not involved in that litigation, limitation of liability under section 4283 was, and the libellants seize upon the following language at page 331:

"Both courts below agreed that the Baxter was unseaworthy on sailing and that respondent failed to exer-

cise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and acts permitting limitation of liability to the vessel and pending freight. R. S. secs. 4282-4289. * * *''

It will be noticed that the failure to exercise due diligence was referred to as that of the respondent, the vessel owner. Had it been only that of the vessel's master, the benefits of the Harter Act would have been lost but not the benefits of the Limitation of Liability Act, under the authorities. Section 4283 (46 U. S. C. A. sec. 183) permits limita- [fol. 816] tion of liability for loss or damage to cargo caused ''without the privity or knowledge of the owner''. The phrase quoted has been construed to refer to some personal fault of the owner or his ''higher representatives'', and not to exclude limitation merely because of negligence on the part of the ship's officers. See Craig v. Continental Ins. Co., 141 U. S. 638; La Bourgogne, 210 U. S. 95; Lord v. Goodall S. S. Co., Fed. Cas. No. 8506 (C. C. Cal.); The Republic, 61 F. 109 (C. C. A. 2); The 84-H, 296 F. 427 (C. C. A. 2); Arkell & Douglas v. United States, 13 F. (2d) 555, 558 (C. C. A. 2); In re Spender Kellogg & Sons, 52 F. 129 (C. C. A). We feel confident that the Supreme Court did not intend by this brief reference to the limitation statute to modify the long established construction of the phrase ''without the privity or knowledge of the owner''. Unseaworthiness of a vessel has nothing to do with limitation of liability by the owner unless it exists with the owner's privity or knowledge. Lack of diligence to make the vessel seaworthy is, therefore, immaterial unless it is within the owner's privity or knowledge. Unless this be borne in mind, the use of the phrase ''lack of diligence to make seaworthy'', which under the Harter Act is not limited to the owner's personal failure in diligence, may well lead to confusion when applied to the Limitation Act. In the case of The Malcolm Baxter, Jr., as appears from the decision of the district court (not officially reported), the vessel's hull had defects which an inspection would have disclosed but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale.

[fol. 817] Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's "privity". So understood the case is quite in line with earlier authorities. In the case at bar, however, the lack of diligence was that of the chief engineer and the owner was not only not in privity with the engineer's default but was found by the court to be free from personal neglect. Therefore, The Malcolm Baxter would not be inconsistent with allowing limitation under section 4283, and is even less inconsistent with allowing exoneration under section 4282. In so far as The Etna Maru, 20 F. (2d) 143 (S. D. Tex.), affirmed upon another ground in 33 F. (2d) 232 (C. C. A. 5) supports the rule contended for by the libellants, we cannot follow it.

The libellants attempt to attribute to the ship-owner personal neglect contributing to the dangerous conditions which resulted in the outbreak of the fire. It is argued that the respondent was chargeable with personal neglect (1) in not notifying Huff, the cargo surveyor, that the coal put in No. 3 'tween deck was being carried for delivery to another of respondent's ships, (2) in not having a shore superintendent to supervise coaling at New York, (3) in not requiring a more rigid inspection of the bulkhead in No. 3 'tween deck, (4) in providing a bulkhead not air tight, and (5) in acquiescing in the practice of placing new coal on old. All these charges except the first have been satisfactorily dealt with in the opinion below, and we find it unnecessary to add to what is there said. The charge of fault in failing to notify Huff that 850 tons of the coal taken on board at New York were not to be used on the [fols. 818 & 818-a] Galileo but were intended for another vessel was apparently not urged below. In our opinion it is without merit. Huff was employed by the New York Board of Underwriters, although his fee for surveying the Galileo's cargo was paid by the respondent. He knew that coal was being carried in No. 3 'tween deck but did not consider it his duty to inspect the coal bunkers, and he testified that it would have made no difference to him whether the coal were bunker or cargo. The failure to notify him was immaterial. Indeed, if the respondent was under a duty to have the loading of coal inspected by any one other than the ship's officers, it should have appointed a shore superin-

tendent for that purpose. That contention was adequately disposed of below, and the denial of it is in substance a denial of the charge now made regarding a failure to have an inspection by Huff. The district court rightly found the owner free from personal fault.

It is urged that the bills of lading issued to Earle & Stoddart, Inc., and to Sanday & Co. were the personal contracts of the respondent to which the limitation acts do not apply. Assuming these contracts to have been personal, they expressly incorporated the exemption accorded by section 4282. The contention that all the bills of lading waived this exemption is also without merit.

Decree affirmed.

[fol. 819] In United States Circuit Court of Appeals, Second Circuit

Earle & Stoddard et al., Libellants-Appellants,

v.

Ellerman's Wilson Line, Ltd., Respondent-Appellee

Decree—Filed Dec. 28, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 820] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 821] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 18, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,623. U. S. Circuit Court of Appeals, Second Circuit. Term No. 20. Earle & Stoddart, Inc., et al., owners of cargo on steamship "Galileo," petitioners, vs. Ellerman's Wilson Line, Ltd., owner of steamship "Galileo." Petition for a writ of certiorari and exhibit thereto. Filed March 19, 1932. File No. 36,623.

No. [redacted] 20

MAR 19[illegible]

IN THE

Supreme Court of the United States

EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners.

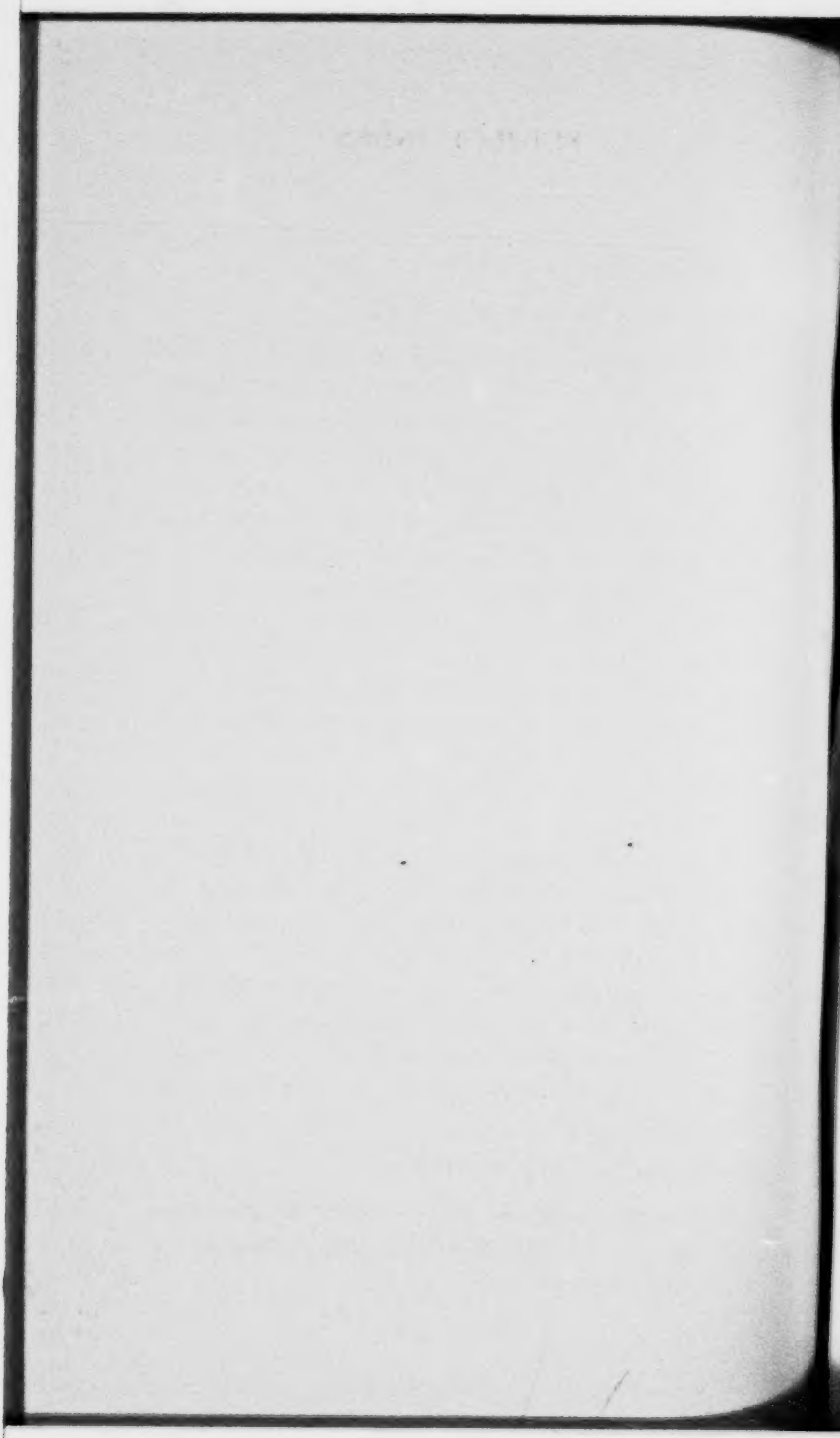
—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.



SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari..... 1

Statement of the matter involved..... 1

The "Galileo" was seriously unseaworthy at the time she sailed from her loading port because there was within her a dangerous fire hazard. That condition could not be remedied by the crew at sea after sailing..... 1

The unseaworthiness and danger were obvious before sailing to any unskilled person..... 1

The respondent breached the express warranty in its personal contract that the "Galileo" was "good" and that "the owners" of the vessel would exercise due diligence at the loading port to make the vessel seaworthy on sailing 2

Even if there had been no express warranty, the shipowner impliedly warranted that the vessel he supplied was at the time of sailing from the loading port seaworthy so far as due diligence could make her so. He therefore under maritime law was under a personal duty at the loading port to see that his vessel did not sail in such an obviously unseaworthy condition, easily ascertainable by an unskilled person, that the crew could not navigate her safely 2

Reasons for granting the writ..... 3

1. Conflict with the Fifth Circuit in *The Etna Maru* case, 33 Fed. 2nd 232, affirming 20 Fed. 2nd 143.....3, 7

PAGE

1a. Conflict with the Fourth, First, Ninth and Third Circuits, approving the doctrine of *The Etna Maru* case.....3, 7

2. Conflict with the decisions of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323; *Benner Line* v. *Pendelton*, 246 U. S. 353, and other cases holding shipowners guilty of personal neglect in failing to supply a vessel which on sailing from the loading port is not as seaworthy and safe as ordinary care can make her against damage from the peril claimed to have caused the damage.....4, 7

3. Conflict with the Ninth Circuit in *Bethlehem Co.* v. *Gutradt Co.*, 10 Fed. 2nd 769, and with the First Circuit in *Christopher* v. *Grueby*, 40 Fed. (2nd) 8, as to "delegability"..... 7

4. Importance of the question involved..... 8

Brief for Petitioners..... 13

Official reports of opinions below..... 13
Jurisdiction of this Court..... 13
Statement of the Case..... 14
Argument 14

I.—The decision is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 Fed. 2nd 232, that breach by a shipowner of its warranty or representation of fact the vessel on sailing from the loading port is seaworthy so far as due diligence can make her so, constitutes neglect of the shipowner precluding reliance on the pro-

PAGE

tection of the Fire Statute (R. S. 4282; U. S. Code, tit. 46, sec. 182). The Circuit Court of Appeals in the present case conceded (R. 789, Opinion, C. C. A. 2) such conflict as to the decision of the District Court (20 Fed. 2nd 143) in *The Etna Maru* case; and its attempted distinction of the decision in that case of the Circuit Court of Appeals for the Fifth Circuit is clearly unsound, the affirmance in that case being on the very ground disapproved of by the Circuit Court of Appeals in the present case... 14

a.—The decision is in conflict with the decisions of the Circuit Courts of Appeals for the Fourth, First, Ninth and Third Circuits which follow the doctrine of *The Etna Maru* case... 16

b.—The Court erred in holding that Congress intended by the Fire Statute (U. S. Code, tit. 46, sec. 182) to permit a shipowner to send his vessel to sea from a loading port in a condition so dangerous because of an obvious fire hazard, that an unskilled man, looking at the vessel, before sailing would have observed the danger..... 24

c.—The Court erred in holding that Congress intended by the Fire Statute (U. S. Code, tit. 46, sec. 182) to exempt a shipowner not only from liability for cargo damage caused by fire, but also from liability for cargo damage due to failure to perform the express warranty in his personal contract that he, as "owner", would take all ordinary precautions up to the time of sailing to prevent outbreak of fire while at sea..... 26

PAGE

II.—The decision of the Circuit Court of Appeals in this case is in conflict with the decision of this Court in *The Malcolmn Baxter, Jr.*, 277 U. S. 323, where this Court held that a shipowner is personally negligent and not entitled to the protection of the Limitation Act (U. S. Code, tit. 46, 183) if he permits his vessel to sail from a loading port without exercising due diligence to ascertain her condition before sailing (*The Malcolm Baxter, Jr.*, 277 U. S. at p. 331). The Circuit Court of Appeals attempts in its opinion to distinguish the *Malcolm Baxter* decision on the ground that in that case the owner had not provided "a suitable person to inspect the vessel which it had purchased without any warranty of seaworthiness in the bill of sale" (R., p. 789). This distinction is unsound because the suit in the *Malcolm Baxter* case was not on the contract of sale, but on the contract of affreightment, and any provision in the bill of sale could in no way relieve the shipowner of a duty under the contract of affreightment. The personal neglect with which this Court charged the New York owner of the "Malcolm Baxter, Jr." was that, although "a survey was made by the owner" "before sailing from New Orleans" (277 U. S. at p. 332), it did not discover unseaworthiness which could have been ascertained by due diligence 31

III.—The decision is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Bethlehem Co.* v. *Gutradt Co.*, 10 Fed. 2nd 769, and of the Circuit Court of Appeals

PAGE

for the First Circuit in *Christopher* v. *Grueby*, 40 Fed. 2nd 8, that where the warranty is that "the owners" of the vessel "have used due diligence" to make the vessel seaworthy, the shipowner's duty to supply a vessel which is seaworthy to the extent that due diligence can make it so, is a personal one which he cannot "delegate" to the ship's officers or third persons in so far as a proper inspection before sailing from the loading port would disclose a dangerous condition 37

IV.—The decision is in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Tucker Co.* v. *Southwark Co.*, 24 Fed. 2nd 410, and of this Court in *The Wildcroft*, 201 U. S. 378; *The Caledonia*, 157 U. S. 124; *Pendleton* v. *Benner Line*, 246 U. S. 353 and in *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, that a general statutory exemption from liability for damages during the contract period from a cause beyond the shipowner's personal control does not exempt him from damages for breach of his personal warranty or representation of fact, made at the time he signs the contract, that at that time due diligence has in fact been exercised by him and his servants to make the vessel seaworthy, and that such diligence will continue until the vessel sails from her loading port..... 38

a. The concurrent findings being that the unseaworthiness on sailing inevitably caused the fire and consequent cargo damage, the legal cause of the cargo damage was of course the

PAGE

unseaworthiness on sailing, the fire being a mere consequence or incident and not the "cause". The loss, therefore, not being caused by fire, the Fire Statute is no defense to the suit for damages from breach of the personal contract in not using ordinary care to make the vessel seaworthy on sailing. A negligent act of the crew before sailing is a condition and not a cause, if it results in the vessel being obviously unseaworthy before she is sent to sea, because the shipowner's personal duty is at the time of sailing to inspect his vessel and not permit her to go to sea in such an obviously dangerous condition that any unskilled person would observe the danger.....38, 39

Conclusion 44

TABLE OF CASES CITED:

PAGE

American Co. v. *Davison Lumber Co.*, 240 Fed. 126 (C. C. A. 2) 42

Annie Faxon, The, 75 Fed. 312 (C. C. A. 9) 7, 20

Asiatic Petroleum Co. v. *Lennard's Carrying Co.*, L. R. (1915), Appeal Cases 705 (House of Lords) 23

Bank Line v. *Porter*, 25 Fed. (2d) 843 (C. C. A. 4). 33

Bethlehem Co. v. *Gutradt Co.*, 10 Fed. 2nd 769 (C. C. A. 9) 7, 37

Calderon v. *Atlas S. S. Co.*, 170 U. S. 272..... 41

Caledonia, The, 157 U. S. 124.....5, 25, 39, 41, 43

Capitol Transportation Co. v. *Cambria Steel Co.*, 249 U. S. 323, 334.....10, 22, 37

Carib Prince, The, 170 U. S. 655.....5, 25, 41

Chattahoochee, The, 173 U. S. 540, 554..... 23

Chesapeake Lighterage Co. v. *Baltimore Co.*, 40 Fed. 2nd 394 (C. C. A. 4th) 7, 16

Christopher v. *Grueby* (*The Commonwealth*), 40 Fed. 2nd 8 (C. C. A. 1) 7, 18, 19

Dobell & Co. v. *S. S. Rossmore Co.*, L. R. (1895), 2 Q. B. 408..... 26

Earle & Stoddart v. *Ellerman's Wilson Line*, 45 Fed. 2nd 231 (S. D. N. Y.)..... 13

Earle & Stoddart v. *Ellerman's Wilson Line*, 54 Fed. 2nd 913 (C. C. A. 2); 42 Lloyds' List Law Reports 19 .....13, 44

Edwin I. Morrison, The, 153 U. S. 199, 203..... 40

Etna Maru, The, 20 Fed. (2nd) 143, affirmed 33 Fed. (2nd) 232 .....3, 7, 8, 14, 15, 17

Fiumana v. *Bunge, L. R.* (1930) 2 K. B. 47..... 35

PAGE

Gokey v. *Fort*, 44 Fed. 364 (S. D. N. Y.) 42
G. R. Booth, The, 171 U. S. 450 27
Great Lakes Towing Co. v. *Mill Transp. Co.*, 155 Fed. 11 (C. C. A. 6) 41

International Nav. Co. v. *Farr*, 181 U. S. 218 26
Irriwaddy, The, 171 U. S. 187 23

Jason, The, 225 U. S. 32, 49, 52, 54 23
Julia Luckenbach, The, 235 Fed. 388 33

Katie, The (*Tucker Co.* v. *Southwork Co.*), 24 Fed. 2nd 410 (C. C. A.) 8, 21, 37
Knott v. *Botany Mills*, 179 U. S. 69, 73 23

La Bourgogne, 210 U. S. 95 36
Loyal, The, 204 Fed. 930 (C. C. A. 2) 37
Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139 ..... 3, 8, 10, 22, 32, 33, 37, 41, 43

Malcolm Baxter, Jr., The, 277 U. S. 323, 3, 5, 8, 9, 22, 25, 31, 32, 33, 34, 35, 39, 41

Navigazione Libera Triestina v. *Garcia* (*The Filtre*), 30 Fed. 2nd 62 (C. C. A. 9) 7, 20

Pendleton v. *Benner Line*, 246 U. S. 353, 3, 8, 9, 21, 22, 25, 29, 32, 33, 37, 39, 43
Pinellas, The (*Charbonnier* v. *U. S.*), 45 Fed. 2nd 174 (C. C. A. 4) 7, 16, 17, 24
Poleric, The (*Porter* v. *Bank Line, Ltd.*), 25 Fed. 2nd 843 (C. C. A. 4), certiorari denied 278 U. S. 623 ..... 7, 17
Providence & N. Y. S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578 (210 U. S. at p. 122) 36

Republic, The, 61 Fed. 109 (C. C. A. 2) 26
Richardson v. *Harmon*, 222 U. S. 96 ..... 22, 32, 33, 37, 43

PAGE

Royal Exchange v. *Kingsley Navigation Co.* (1923), Appeal Cases 235, 244..... 28

Soerstad, The, 257 Fed. 130 (S. D. N. Y.)..... 42

Southwark, The, 191 U. S. 1, 6..... 23

Tempus Shipping Co. Ltd. v. *Louis Dreyfus & Co.,* 40 Lloyds' Law Reports, 217.....22, 23

Tucker v. *Southwark Co.,* 24 Fed. 2nd 410.....21, 43

Walker v. *Transportation Co.,* 3 Wall. 150, 153.... 24

Wildecroft, The, 201 U. S. 378.....22, 43

AUTHORITIES AND TEXT BOOKS CITED:

Revised Statutes:

U. S. Code, tit. 46, Sec. 182, Section 4282..... 2, 5, 14, 36, 37, 40, 41

U. S. Code, tit. 46, Sec. 183, Section 4283..... 36, 37, 43

Lloyd's List Law Reports..... 9

Section 240 of Judicial Code as amended by Act of February 13, 1925 (U. S. Code tit. 28, Sec. 347). 13

Article III, Section 2, clause 1 of the United States Constitution 13

Harter Act 22

Section 2 38

Section 3 30

English Fire Statute..... 24

IN THE

Supreme Court of the United States

EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Earle & Stoddart, Inc., et als., for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of the Matter Involved.

1. The libel was filed in admiralty by the petitioners, owners of cargo shipped at New York on the British steamship "Galileo", against her owner as a common carrier for cargo damage. The courts below have found concurrently that a dangerous fire hazard existed on shipboard at the time of sailing from the loading port; that such hazard constituted serious unseaworthiness; that the danger and unseaworthiness were easily observable be-

fore the vessel sailed by even an unskilled person and were in fact observed by a stevedore and eight coal trimmers who had no authority from the respondent to remedy the dangerous condition; and that the cargo damage resulted "inevitably" from that unseaworthiness on sailing. The Courts have further found that the unseaworthiness resulted from negligence of the chief engineer while the "Galileo" was at the loading port and consisted in failing to heed warnings from the stevedore and coal trimmers that the coal already in the bunker was "very hot", and in permitting the stevedores to load a new lot of respondent's coal on top of the very hot coal already in the bunker. The respondent's managing officers had peremptorily ordered that the new lot of coal be loaded as bunkers for use on another vessel of the owners after arrival at destination. The captain of the "Galileo" admitted that the dangerous condition in which the ship sailed could not be remedied at sea (R., p. 85).

2. The defense, sustained by the Circuit Court of Appeals (R., pp. 785-790), was that, as matter of law on these undisputed facts, the shipowner was exonerated from all liability because of the Fire Statute (R. S. 4282, U. S. Code, tit. 46, sec. 182). It held that Congress, by the Fire Statute, intended to repeal and did repeal, in so far as fire is concerned, the well-settled rule of maritime law that the minimum possible duty of a shipowner, by contract or otherwise, is to supply a vessel which at the time of sailing from the loading port is seaworthy and safe from fire and other perils to the extent that use of ordinary care can make her so. The Court further held that a shipowner may, without subjecting himself to any liability, permit his vessel to sail from her loading port with a dangerous fire hazard

within her, although the hazard is irremediable by the crew at sea after sailing, and is observable, before sailing, by an unskilled person looking at the vessel. This defense was sustained notwithstanding the circumstance that the shipowner by personal written contract had warranted that "the owners" (R., p. 698) of the vessel would exercise due diligence to make her seaworthy at the time she was sent to sea from the loading port. (See *infra*, paragraph 10, p. 4.) The Court specifically refused (R., p. 789) to follow a contrary ruling in the Fifth Circuit in *The Etna Maru*, 20 Fed. (2nd) 143, affirmed 33 Fed. (2nd) 232. The rule in *The Etna Maru* is in accord with the rule prevailing in the Fourth, First, Third, and Ninth Circuits, and with the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, *Pendleton* v. *Benner Line*, 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

7. The foregoing concurrent findings of fact by the Courts below are amply supported by the uncontradicted evidence introduced by the respondent itself.

8. In August, 1926, the respondent, through its New York agents, Ellerman's Wilson Line, Inc., 26 Broadway, New York City (R., p. 698), whose stock was altogether owned by respondent (R., pp. 423 and 432), held itself out at New York by "advertising in the papers" (R., p. 423) as a common carrier of goods on its steamship "Galileo" from New York to Hull, England (R., p. 698), and endeavored "to book all the cargo we can for her and we get it alongside the steamer" (R., p. 423). The bills of lading as matter of usual practice were issued and signed by the Ellerman's Wilson Line (R., p. 423).

9. On August 27, 1926, at New York, various persons, the petitioners here, shipped goods on board the "Galileo"

and received from the respondent negotiable bills of lading. The bills of lading covering the major portion of the cargo were signed as follows:

> "Ellerman's Wilson Line, Limited,
> By Ellerman's Wilson Line, New York, Inc.,
> as Agents." (R. 698.)

10. By the terms of all the bills of lading, the respondent acknowledged receipt of the goods "in apparent good order and condition" (R., p. 698) and promised that the goods would "be transported by the *good* steamship 'Galileo'" (R., p. 698) and would "be delivered in like good order and condition at the port of Hull" (R., p. 698). The implied absolute warranty of seaworthiness, and the express warranty that the "Galileo" was "good", were limited only by the provision that the owners were not to be liable for losses from unseaworthiness "provided *the owners* have exercised due diligence to make the steamer seaworthy" (R., p. 698). The bills of lading provided that:

> "The carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default * * * by fire or flood, from any cause or wheresoever occurring; * * * or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, *provided the owners* have exercised *due diligence to make the steamer seaworthy*" (R., p. 698). (Italics ours.)

The bills of lading also contained the following provision:

> "It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes." (R. 698.)

There is nothing in this clause to indicate an intention to modify the warranty. The warranty is therefore not modified by it. *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655, and *The Malcolm Baxter, Jr.*, 277 U. S. 323. Indeed the Fire Statute, which is Section 4282, R. S., is not mentioned at all in the clause.

11. Before the "Galileo" sailed from New York, a cable was received by respondent's New York agents (R., p. 424) from the managing owners of the respondent at Hull, England, peremptorily directing (R., pp. 424-425) that 850 tons of coal belonging to the respondent be also loaded on the "Galileo" as bunkers for use on another of respondent's vessels, the "Francisco", to which the coal would be transferred after arrival at Hull (R., pp. 424-425). The cable in full was as follows (R., p. 713, Respondent's Exhibit D):

> "HULL 9 AUGUST 20, 1926
> LCO WILSONLYN NY
> 'GALILEO' LOAD EIGHTFIFTY BUNKERS
> TRANSFERENCE 'FRANCISCO' ".

12. The respondent's New York Agents employed stevedores, the Jarka Company of New York, to load the coal. Magarelli, the foreman stevedore of the Jarka Company, proceeded on the coal boat to the "Galileo" with a gang of eight coal trimmers (R., pp. 416-417). When the trimmers went into the bunkers on the "Galileo", they discovered that the old bunker coal, remaining from a previous voyage was so "very hot" that it "burned their boots" and made one of the trimmers so sick that he "fell out" (R., p. 417). The heat and gas in the bunkers were so bad that none of the trimmers could work for more than 10 or 15 minutes at a time (R., p. 417). The trimmers accordingly protested to Magarelli that "they can't work no more" (R., p. 417) and

"started to kick and holler, it was too warm down there" (R., p. 417); that "The coal, it is too warm" (R., p. 417). Magarelli while on the coal boat alongside the "Galileo", could "smell the gas over the side, there was gas come on the coal boat" (R., p. 419). Magarelli on receiving the protest "went down in the hatch" himself (R., p. 417), and found that "the coal was too warm" (R., p. 417), and that "the men could stay there only 10 or 15 minutes to work" (R., p. 417).

13. Magarelli then went immediately to see Oxtoby, the chief engineer of the "Galileo", who was on board her (R., p. 418), and protested: "The coal is very hot" (R., p. 418);—the coal that is already in the bunkers (R., p. 418). "Chief, my men be kicking there down below, it is warm, and they con't stay down below" (R., p. 418). The chief engineer didn't pay any attention to Magarelli's protest (R., p. 418), and "they went on loading the coal" (R., p. 418).

14. Oxtoby, the chief engineer of the "Galileo" testified that before the "Galileo" sailed from New York Magarelli "the foreman came to me" (R. 392); "The foreman of the coal trimmers, and he said that the coal was hot" (R., p. 392); and "He said it was burning the men's boots" (R., p. 392). Oxtoby ignored the protest (R., p. 392).

15. Within six hours after the "Galileo" sailed from New York, bound for Hull, the heating reached the ignition point and fire broke out in the coal in the compartment where Magarelli's men had been working (R., p. 85). The fire was so serious that after a consultation of officers (R., p. 303), without waiting for a reply to an urgent wireless message from her master to the Ellerman's Wilson Line, Inc. at New York, informing the Line of the fire and suggesting return to port and dis-

charging or shifting of coal (R., pp. 85-86, 304), it was decided to proceed back to New York (R., p. 304), where "assistance could be obtained to shift to get at the seat of fire which meant shifting from 250 to 300 tons" (R., p. 85), and which shortly afterwards resulted in the sinking of the vessel and her cargo (R., pp. 85-87, 69).

16. The decision in this case of the Circuit Court of Appeals for the Second Circuit is *concededly* (R., p. 789, Opinion C. C. A. 2) in conflict with the decision in the Fifth Circuit in:

The Etna Maru (20 Fed. 2nd 143, S. D. Tex.; affirmed 33 Fed. 2nd 232, C. C. A. 5).

17. The decision is also in conflict with the following decisions of the Circuit Courts of Appeals for the Fourth, First, Ninth and Third Circuits:

C. C. A. 4:

Chesapeake Lighterage Co. v. *Baltimore Co.*, 40 Fed. 2nd 394 (C. C. A. 4);
The Pinellas (*Charbonnier* v. *U. S.*), 45 Fed. 2nd 174 (C. C. A. 4);
The Poleric (*Porter* v. *Bank Line, Ltd.*), 25 Fed. 2nd 843 (C. C. A. 4).

C. C. A. 1:

Christopher v. *Grueby* (*The Commonwealth*), 40 Fed. 2nd 8 (C. C. A. 1).

C. C. A. 9:

Bethlehem Co. v. *Gutradt Co.*, 10 Fed. 2nd 769 (C. C. A. 9);
The Annie Faxon, 75 Fed. 312 (C. C. A. 9);
Navigazione Libera v. *Garcia* (*The Filtre*), 30 Fed. 2nd 62 (C. C. A. 9).

C. C. A. 3:

The Katie (*Tucker Co.* v. *Southwork Co.*), 24 Fed. 2nd 410 (C. C. A.).

18. The decision in this case is further in conflict with the decisions of this Court in:

The Malcolm Baxter, Jr., 277 U. S. 323;
Pendleton v. *Benner Line*, 246 U. S. 353;
Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

Importance of the Question Involved.

The decision of the Circuit Court of Appeals rests on the following fundamental proposition:

> "Unseaworthiness of a vessel has nothing to do with limitation of liability by the owner unless it exists with the owner's privity or knowledge. Lack of diligence to make the vessel seaworthy is therefore immaterial unless it is within the owner's privity or knowledge" (R., pp. 788, 789).

The Circuit Court of Appeals further holds that the breach of a warranty of seaworthiness, whether the warranty be absolute, or reduced to that of using due diligence to make the vessel seaworthy, does not constitute neglect of the shipowner or privity or knowledge.

The doctrine thus announced by the Circuit Court of Appeals is in direct conflict with the decision of *The Malcolm Baxter, Jr., supra; Pendleton* v. *Benner Line, supra,* and *Luckenbach* v. *McCahan Sugar Company, supra,* cited under paragraph 18 of this petition, and *The Etna Maru,* 20 Fed. (2d) 143, affirmed 33 Fed. (2d) 232 (C. C. A. 5)—see paragraph 16 of this petition. The doctrine as announced by the Circuit Court of Appeals in the present case relieves the shipowner of all duty

to make his ship seaworthy in respect of a fire, and goes further and discharges the shipowner of all obligation to owners of cargo when the loss to cargo has been caused by a breach of the warranty of seaworthiness in the shipowner's contract, notwithstanding the fact that the unseaworthiness was so obvious that it could have been observed before sailing from the loading port by an unskilled person, and was in fact observed by nine unskilled persons, as the Courts below have concurrently found.

It is noteworthy, in illustration of the importance of the decision, that it has been selected by the editors of Lloyd's List Law Reports in England as one of the few opinions of American courts which they have quoted in full. Many shipping journals in England and America have published summaries of the decision and articles relating to it.

If the decision is allowed to stand a shipowner has every inducement to remain away from his ship while in the loading port and also to keep his shore agents and representatives from going on board. This Court held in *Pendleton* v. *Benner Line*, 246 U. S. 353, that, if the shipowner had gone on board and had not seen the unseaworthy condition which any unskilled observer could see, he would have been personally negligent for not discovering it, and was, therefore, outside any protection afforded by the Limitation Act. The Court in the present case in effect encourages the shipowner not to go on board while in the loading port and thus subject himself to the possibility of seeing what it is his duty to provide against. In other words, the Court below in the present case undermines the effect of this Court's decision in the *Benner Line* case—*Pendleton* v. *Benner Line*, 246 U. S. 353—(and in *The Malcolm Baxter, Jr.*, 277 U. S.

323; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139; and *Capitol Transp. Co.* v. *Cambria Steel Co.*, 249 U. S. 323), by denying absolutely that a shipowner is bound to perform his duty as "owner", viz.: to use reasonable care to make his vessel seaworthy up to the time he sends her to sea from the loading port. The general importance and far-reaching consequences of the unprecedented decision of the Court below in the present case are obvious when it is realized that it makes it to shipowners' financial interest to refrain from going on board their vessels, and to keep their shore agents away from their ships for fear they might discover, or that they may be charged with having reasonable means of discovering, a dangerous condition which any unskilled observer could see. The decision, therefore, directly tends to increase the danger while at sea to all persons and goods on ships leaving United States ports. It is a direct repudiation of the duty of shipowners as settled by the maritime law from ancient times. That duty is that either personally or by their shore agents or inspectors, the shipowner must make such an ordinary inspection of the vessel at the time of sailing from the loading port as any ordinarily prudent unskilled man would make of his vessel before sending her to sea on a long voyage.

WHEREFORE, the petitioners pray that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled in that Court "Earle & Stoddart, Inc., et als, libellant-appellants, against Ellerman's Wilson Line, Ltd., Owner of Steamship Galileo, respondent-appellee", 1931 Term, No. 97, and that the decree of said Circuit Court of

Appeals entered on the 28th day of December, 1931, be reversed, and for such other relief in the premises as may be just.

Dated, March 17, 1932.

EARLE & STODDART, INC.,
By H. B. EARLE,
Treasurer,
on its own behalf and on behalf of the other owners of cargo on the S.S. "Galileo", petitioners herein.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

Certificate of Counsel.

We hereby certify that the foregoing petition in our opinion is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Dated, March 17, 1932.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinions below are officially reported as:

Earle & Stoddart v. *Ellerman's Wilson Line,* 45 Fed. 2nd 231 (S. D. N. Y.; R., p. 726);
Earle & Stoddart v. *Ellerman's Wilson Line,* 54 Fed. 2nd 913 (C. C. A. 2, R., p. 785);
42 Lloyds' List Law Reports 19.

Jurisdiction of This Court.

The jurisdiction of this Court is under section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code, tit. 28, sec. 347), and on Article III, section 2, clause 1, of the Constitution of the United States. The proceeding is a libel in admiralty by cargo owners against the owner of a vessel which was a common carrier for breach of the contract of affreightment.

The present petition seeks a review of the action of the Circuit Court of Appeals for the Second Circuit in dismissing the libel.

Statement of the Case.

The facts are summarized in the petition.

I.

The decision in the present case is, as the Court recognizes in its opinion (R. 789), in conflict with the decision in the Fifth Circuit in the "Etna Maru", 20 Fed. 2d. 143 (S. D. Tex.) affirmed 33 Fed. 2d. 232 (C. C. A. 5), where it was held that breach by the owners of a vessel of a warranty that the owners have exercised due diligence to make the steamer seaworthy deprives them of the protection of the fire statute (R. S. 4282, U. S. Code, tit. 46, sec. 182). In the present case the Circuit Court of Appeals has found that the unseaworthiness caused the fire, and that the unseaworthiness could have been discovered before sailing by the exercise of due diligence. Both the Circuit Court of Appeals for the Fifth Circuit and the District Court in the *Etna Maru* case held that those findings established neglect of the vessel owner and therefore deprived it of the protection of the fire statute.

The Circuit Court of Appeals for the Second Circuit in its opinion in the present case refused (R. 789) to "follow" the decision in the Fifth Circuit in *The Etna Maru,* 20 Fed. 2nd 143 (S. D. Tex.), affirmed 33 Fed. 2nd 232 (C. C. A. 5), saying (R. 789):

> "In so far as *The Etna Maru,* 20 F. (2d) 143 (S.D. Tex.), affirmed upon another ground in 33 F. (2d) 232 (C. C. A. 5) supports the rule contended for by the libellants, we cannot follow it."

The Court in the present case was mistaken in stating in its opinion that the District Court's decision in *The Etna Maru* was "affirmed upon another ground" (R. 789). The Court does not state what the "another ground" was, and it is plain from the opinions of the two Courts in *The Etna Maru* case that it was non-existent.

In *The Etna Maru* case both the Circuit Court of Appeals and the District Court held that the breach of the warranty of seaworthiness which caused the fire, established neglect of the vessel owner, the courts finding that the unseaworthiness could have been discovered by the exercise of due diligence. In that case the Circuit Court of Appeals for the Fifth Circuit said (33 Fed. 2nd at pp. 234 and 235):

> "It is certain that *the unseaworthiness of the vessel* at the beginning of the voyage *amounted to negligence of either itself or its employees.* There is nothing in the statute to bar a recovery against the ship. *Richardson* v. *Harmon,* 222 U. S. 96; *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334; The Malcolm Baxter, Jr., 277 U. S. 323." (Italics ours.)

And again the Court said (33 Fed. 2nd at p. 233):

> "While there is some conflict in the testimony, a clear preponderance supports the conclusions reached by the District Court."

The District Court in *The Etna Maru* case, speaking through Judge Hutcheson (now Judge of the United States Circuit Court of Appeals for the Fifth Circuit), said (20 Fed. 2nd at p. 146):

> "I agree with libellant in his contention, that a shipowner must make his vessel seaworthy before the beginning of the voyage; that this duty is non-delegable, and *if it is not seaworthy* on ac-

count of conditions existing before the beginning of the voyage and fire springs from that condition, *there is a neglect on the part of the owner* within the meaning of the fire statute, for which he must account."

Ia.

Conflict With Fourth Circuit.

The decision in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Chesapeake Lighterage Co.* v. *Baltimore Co.*, 40 Fed. (2nd) 394). In that case the master negligently permitted the charterers to load a large quantity of copper bars on his vessel which was not in seaworthy condition to receive them, with the result that she soon sank. The shipowner introduced evidence that he had no personal knowledge of the unseaworthiness or the negligent loading, and therefore asked for exemption from liability. The Circuit Court of Appeals for the Fourth Circuit, however, said (40 Fed. 2nd at p. 395):

> "For authorities on the law that controls the question as to the privity or knowledge of the owner, reference to *The Virginia* (D.C.) 264 F. 986, *Sorenson et al.* v. *Boston Insurance Co. of Boston, Mass.*, 20 F. (2d) 640, and *Bank Line* v. *Porter* (*The Poleric*) 25 F. (2d) 843, will show the rule as laid down by this court. Under these decisions the judge below rightly held that the superintendent of *the appellant company could, by proper inspection, have discovered the unseaworthiness of the barge,* and that the *appellant was therefore chargeable with knowledge of such unseaworthiness.*
>
> The decree of the court below is accordingly affirmed." (Italics ours.)

In *Charbonnier* v. *United States* (*The Pinellas*), 45

Fed. 2nd 174, the Circuit Court of Appeals for the Fourth Circuit said (at p. 177):

> "The owners contend that even if the ship was unseaworthy, the evidence does not show that they were personally negligent in this respect, because the ship was built by an experienced and competent builder and was passed by official surveyors of the American Bureau of Shipping as being seaworthy in all respects; and it is pointed out that in such well-known cases as *Walker* v. *Transportation Co.*, 3 Wall. 150, 153, 18 L. Ed. 172, and *The Strathdon* (D.C.) 89 F. 374, it was held that the neglect which deprives the shipowner of the protection of the Fire Statute is his personal neglect and not merely the neglect of his officers or agents in charge of the ship. But in each of these cases, there was no showing that the ship was unseaworthy at the beginning. The negligent conduct complained of took place during the course of the voyage."

The Court then, referring to the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, said it was not disposed to criticize the rule in that case.

In *The Poleric* (*Porter* v. *Bank Line, Ltd.*), 25 Fed. (2nd) 843, cert. denied 278 U. S. 623, the Circuit Court of Appeals for the Fourth Circuit found that the fire in that case was due to the unseaworthiness of the vessel at the beginning of her voyage from Calcutta to New York. The Court said (at p. 846):

> "It is contended on behalf of the respondent that it is exempted from liability by the fire statute. This statute is set out in full in *The Poleric, supra.* On this point we agree with the learned judge below, when he says: 'In view, however, of the decision which I have reached on the subject of the seaworthiness of the "Poleric" at the commencement of the voyage, what is said above may after all be wholly academic since, if the ship was not seaworthy, and this fact was due to the per-

sonal negligence of the owner, and the failure in that respect was the cause of the loss, that of itself would make the statute inoperative. *The Virginia* (D. C.) 264 F. 986; *Hines* v. *Butler* (C. C. A.) 278 F. 877; *The Elizabeth Dantzler* (D. C.) 263 F. 596; *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1914), 1 K. B. 419-424 (1915) A. C. 705.'

The fire statute does not apply where the owner has contributed to the loss by his own neglect. *Walker* v. *Transportation Co.*, 3 Wall. 150, 18 L. Ed. 172. Here the owner, by its neglect in allowing the 'Poleric' to sail from Calcutta in an unseaworthy condition, did contribute to the loss."

Conflict With the First Circuit.

The decision in this case is in conflict with the decision in *Christopher* v. *Grueby* (*The Commonwealth*), 40 Fed. 2nd 8 (C. C. A. 1), that a shipowner is chargeable with personal knowledge, or reasonable means of knowledge, of any "dangerous fire hazard" existing on his vessel at the time of sailing which an unskilled "average man" would observe if interested enough to look around the vessel before she sailed. The fire in that case was caused by the negligence of the vessel's engineer in spilling gasoline (p. 13 of 40 Fed. 2nd) while pouring it from a can into the reservoir of the lighting plant, thus permitting it to become ignited. The "lighting plant" on the vessel was not supplied with pipes for gasoline. Its reservoir, therefore, had to be filled by pouring gasoline from a can. The shipowner claimed the protection of the Fire and Limitation Statute; denied personal knowledge; and alleged that anyway it was a technical matter for experts and not for an unskilled shipowner. The Circuit Court of Appeals for the First Circuit held, however, that the shipowner must be presumed as matter of law to have personal knowledge

or means of knowledge of "dangerous fire hazards" existing on his own vessel before sailing, and of the fact "that gasoline was likely to be spilled" (p. 11 of 40 Fed. 2nd), saying:

> "It did not require the knowledge of an expert to appreciate this. The average man who gave the situation any consideration would understand and appreciate it. * * * It is true that the 'owners' duty did not require them to provide a vessel of fireproof construction, or to adopt the latest appliances, or the best safety devices'; but it did require them to provide reasonably safe appliances and equipment that would render those appliances reasonably safe for the uses to which they were to be put in the place where installed and the condition there existing."

And at page 12 of 40 Fed. 2nd, the Circuit Court of Appeals for the First Circuit said:

> "Was the fire caused by the negligence of the owners or any of them in failing to provide and equip a seaworthy vessel?
>
> The duty of ship owners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, *responsibility for which they cannot escape by delegating its performance to another.* In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work."

And at page 13 of 40 Fed. 2nd, the Court further said:

> "The District Court found that the fire was due to the negligence of the engineer and not from any defective condition of the machinery or equipment on board the vessel. *But it does not follow that because the engineer may have been negligent that the owners are free from fault.*" (Italics ours.)

Conflict With the Ninth Circuit.

The decision in this case is in conflict with the decision in *Navigazione Libera Triestina* v. *Garcia* (*The Feltre*), 30 Fed. 2nd 62 (C. C. A. 9). In that case, as here, the shipowner inserted in his bill of lading a clause exempting him from the usual implied absolute warranty of seaworthiness and limiting his duty and promise to the exercise of due diligence to make the vessel seaworthy at the time of sailing from the loading port.

The Court held that the unseaworthiness would "have been discovered on inspection" by her owner (30 Fed. 2nd at p. 64), and that he was therefore liable.

In *The Annie Faxon*, 75 Fed. 312, at 314-315, the Circuit Court of Appeals for the Ninth Circuit said:

> "We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, *unless the defects were apparent, and of such a character as to be detected by the inspection of an unskilled person.*"

And, again, at page 315 of 75 Fed. the Court said:

> "When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded of *the inspector of a boiler.* It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concern *injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert.*"

Conflict With the Third Circuit.

In *Tucker Stevedoring Co.* v. *Southwark Manufacturing Co.* (*The Katie*), 24 Fed. (2d) 410, the Circuit Court of Appeals for the Third Circuit, in considering whether the owners of the "Katie" could limit their liability when the "Katie" was unseaworthy and the owners had no knowledge of such unseaworthiness, held that because of the implied warranty of seaworthiness, the limitation statute did not apply. In the course of its opinion the Court said:

> "The present contract being for lighterage, we think there was an implied contract that the lighters would be seaworthy. In that regard we agree with the holding of *The Loyal* (C. C. A.), 204 F. 931, where it was said: 'The vessel owner had a written contract with the cargo owner for lighterage services covering an extended period. This lighterage contract implied an obligation that the lighters to be furnished under it should be seaworthy. * * * The implied contract that the lighter was seaworthy, attached to the * * * contract, was, in our opinion, just as much the personal contract of the vessel owner as the express contract itself. It was precisely as if written in the contract.'"

That Court held that for this reason the limitation should be denied, citing the following language from *Pendleton* v. *Benner Line*, 246 U. S. 356:

> "We are not disposed to disturb the very strong and deliberate intimation of *Richardson* v. *Harmon* in their application to the present case. * * * Unless the petitioner can be discharged from his contract altogether, he must answer for the breach, whether he was to blame for it or not."

This Court held in *Pendleton* v. *Benner Line*, 246 U. S. 353, that unseaworthiness displaces the contractual and

statutory exemptions of the shipowner in so far as damages flow from the unseaworthiness.

In *The Wildcroft,* 201 U. S. 378, this Court held that the maritime law since time immemorial, entirely independently of the Harter Act, requires a shipowner, as a condition to a claim that a peril caused a loss, to establish that he used ordinary care, before the alleged peril was encountered, to supply a vessel which was reasonably safe or protected against that peril to the extent required by the maritime law. In that case this Court said (201 U. S. at pp. 388-389):

> "The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner."

The Court below relied largely upon certain English decisions, which, upon analysis, can be shown to be inapplicable. It is sufficient at this time to point out that the English law as stated by the Court is not in accord with the decisions of this Court in *The Malcolm Baxter, Jr.,* 277 U. S. 323, *Pendleton* v. *Benner Line,* 246 U. S. 353, *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139, *Capitol S. S. Co.* v. *Cambria Co.,* 249 U. S. 334, and *Richardson* v. *Harmon,* 222 U. S. 96. Also in the only House of Lords case cited by the Court below—*Tempus Shipping Co.* v. *Louis Dreyfus & Co.,* 40 Lloyds Law Reports 217, 219 (officially reported in L. R. 1931 Appeal Cases 726) Lord Atkin in delivering judgment, said:

> "I have not thought it necessary to deal with

> the decision of the Supreme Court of the United States in *The Irriwaddy*, 171 U. S. 187, because, as pointed out by Greer, *L. J.*, in the Court of Appeal, that case was decided on distinctions then existing between the law of the United States and this country to which the majority of the Supreme Court expressly drew attention."

Lord Atkin was under a misapprehension if he meant to imply that the American law as stated by this Court in *The Irriwaddy*, 171 U. S. 187, has since been changed, either by Act of Congress or by any decision of this Court modifying the law as there laid down. Indeed, later decisions of this Court reiterate the doctrine of *The Irriwaddy*. See

> *The Chattahoochee*, 173 U. S. 540, 554;
> *Knott* v. *Botany Mills*, 179 U. S. 69, 73;
> *The Southwark*, 191 U. S. 1, 6;
> *The Jason*, 225 U. S. 32, 49, 52, 54.

It is, therefore, apparent that there is a recognized distinction between the American and English cases in connection with the point under discussion in the *Tempus* case. A case in the House of Lords in which the facts more closely resemble those in the present case than any of the English cases cited by the Circuit Court of Appeals, is *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.*, L. R. (1915) A. C. 705 (House of Lords), which is not mentioned by the Court below in its opinion, and in which the House of Lords held that the English Fire Statute does not exempt a shipowner from liability for cargo damage from a fire which is caused by unseaworthiness in a case in which proper supervision and inspection by the shipowner in the loading port would have disclosed the unseaworthy condition before the vessel put to sea.

IB.

Congress did not intend by the Fire Statute to authorize shipowners to send obviously and seriously unsafe and unseaworthy ships to sea. But that is precisely what the Circuit Court of Appeals for the Second Circuit has held in this case. We submit that Congress did not intend to relieve shipowners from their personal contractual and non-delegable duty imposed by the maritime law of seeing to it that ordinary care is used in preparing their ships to go to sea from the loading port. Nor did Congress intend by that Statute to permit a shipowner to evade liability for careless performance of that personal duty by any device such as by absenting himself personally from the loading port. Nor did Congress intend by the Fire Statute to authorize shipowners to "delegate" to the crew the performance of the shipowner's personal duty for him at the loading port.

Indeed, this was the very point which was emphasized by the Circuit Court of Appeals for the Fourth Circuit in *Charbonnier* v. *United States,* 45 Fed. (2d) 174, at page 177. During the argument of that case, *Walker* v. *Transportation Co.,* 3 Wall. 150, 153, was much relied upon by counsel representing the shipowner. The Court disposed of this contention by stating that the *Walker* decision was not in point because there was no evidence whatever in that case that the ship was unseaworthy at the beginning of the voyage. That distinction pointed out by the Circuit Court of Appeals for the Fourth Circuit was entirely overlooked by the Circuit Court of Appeals for the Second Circuit in deciding the present case. The Court in the present case erroneously assumed that the warranty of seaworthiness had been breached in the *Walker* case. In so doing the Court not only misapprehended the facts in the *Walker* case, but it

also disregarded the decisions of this Court in *Pendleton* v. *Benner Line, supra,* and in *The Malcolm Baxter, Jr., supra,* that Congress did not intend by the Limitation Act, in cases where there has been a breach of the shipowner's warranty, to exempt shipowners from damages caused by sending vessels to sea which are not seaworthy as far as due diligence can make them so. In *Pendleton* v. *Benner Line,* this Court, in the concluding paragraph of the opinion, said:

> "It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether, he must answer for the breach, whether he was to blame for it or not."

The conclusion of this Court in *Pendleton* v. *Benner Line,* is in entire accord with what was later said by this Court in *The Malcolm Baxter, Jr.* Indeed, the very language which the Court below accuses us of having "seized" upon from *The Malcolm Baxter, Jr.* opinion, is merely a restatement of the ground of decision in *Pendleton* v. *Benner Line.* What was there held is the well settled rule of this Court. This Court has consistently held that exemptions or limitations under the Limitation Act or under exceptions contained in a bill of lading, do not protect the shipowner in so far as the damages flow from the unseaworthiness.

The Caledonia, 157 U. S. 124;
The Carib Prince, 170 U. S. 655;
Pendleton v. *Benner Line,* 246 U. S. 353;
The Malcolm Baxter, Jr., 277 U. S. 323.

None of the cases cited by the Court below as sustaining its position deal with losses caused by unseaworthi-

ness, excepting *The Republic,* 61 Fed. 109 (C. C. A. 2), and in that case, both Courts held the shipowner liable. The District Court held that the breach of warranty precluded the shipowner from the benefits of the limitation statute. The Circuit Court of Appeals in affirming the decision did not find it necessary to consider that question because of its finding that the shipowner could have discovered the unseaworthiness if it had exercised due diligence, and therefore was negligent in not having done so. There is nothing in the decision from which it can be inferred that, when a defect is easily ascertainable at the loading port by an unskilled person, it thought that an owner was entitled to the benefit of the statute in respect of losses caused by the breach of the warranty.

The Court below seems to indicate (R. 787) that our position was that, irrespective of causal connection between the unseaworthiness and the loss, an owner should be held liable. Our printed brief in the court below shows the contrary.

Sailing from the loading port with an observably unsafe condition on board which cannot be remedied by the crew while at sea in the ordinary course of their duties not only constitutes unseaworthiness but also constitutes a personal failure by the shipowner to exercise due diligence to make the ship seaworthy.

International Navigation Co. v. *Farr,* 181 U. S. 218;

Dobell & Co. v. *S. S. Rossmore Co.,* L. R. (1895), 2 Q. B. 408.

Ic.

The Circuit Court of Appeals was under a misapprehension in stating in its opinion that "The parties agree that the fire was the proximate cause of the loss" (R.

p. 786). No such stipulation is in the record or was ever made (unless the Court uses the word "proximate" as the equivalent of "immediate"). The stipulation entered into on November 1, 1929 (R., p. 696), before the respondent disclosed on November 11, 1929 (R., pp. 392, 416, 374) the facts exclusively within its knowledge as to the obviousness of the unseaworthiness before the ship sailed, was in full as follows (R., p. 695):

> "3. All of the merchandise shipped on the S.S. 'Galileo' on the voyage mentioned in the libels sustained some damage from fire occurring on board said steamer and/or water resulting from an effort to put out the fire."

Nothing whatever was said in the stipulation about "proximate cause", which was the issue litigated at the trial. The cargo damage, of course, "followed" the fire, but the fire was only an immediate cause because according to the concurrent findings below, based on evidence introduced by the shipowner in its defense, it resulted inevitably from the real or proximate cause, namely, the obviously unseaworthy and dangerous condition of the vessel on sailing.

The fact that there was an intervening fire resulting inevitably from the unseaworthiness does not make that fire the cause of the loss. The cause of the loss was failure to see to it that ordinary care was used at the loading port to make the vessel safe and fit to go to sea.

In *The G. R. Booth,* 171 U. S. 450, at page 460, the Court said:

> "In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the

plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to."

And again at page 460:

"The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion—events so linked together as to form one continuous whole."

In *Royal Exchange* v. *Kingsley Navigation Co.* (1923), Appeal Cases 235, it is said, at page 244:

"Mr. Mather, in his cross-examination, was unable to make any alternative suggestion of the origin of the fire, except that of the heat generated by the contact of lime and water. He added, with perfect candour, 'Well, frankly, I will tell you that nothing has occurred to me, or anybody that I have spoken to, except the combination of lime and water.' Their Lordships cannot doubt that *the unseaworthiness* of the 'Queen City' *was the natural and direct* cause of leakage, sufficient to bring water into contact with the lime cargo, and that the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that *the loss is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire* within the protection of s. 7. The train of causation, from the unseaworthiness of the 'Queen City' to the outbreak of the fire, is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), A. C. 350, 369, the proxi-

mate cause of a loss is not necessarily the cause nearest in time.

The question of onus is not material in these circumstances; but if a shipowner seeks to escape liability, on the ground that the loss arose from fire, the onus of showing that the loss did arise from fire is affirmatively upon him." (Italics ours.)

The subsequently-occurring "fire" was the natural and probable consequence of the breach of contract. To contend that such fire is the "cause" of the damage is to argue that an effect can be the cause of the cause which produces the effect.

On the facts concurrently found by the courts below, the fire and consequent cargo damage were inevitably caused by the respondent's personal breach of warranty. The duty of supplying a vessel which is reasonably safe for the voyage is that of the shipowner and not of the ship's crew.

The Courts below assumed that, since conceivably an owner of an unseaworthy vessel might be entitled to the benefit of the Fire Statute when the unseaworthiness had nothing to do with causing the fire, therefore in all cases, even where the fire is caused directly by the breach of warranty, the shipowner should be exonerated from liability. For instance, the opinion of the Circuit Court of Appeals is devoted almost entirely to a discussion of the question whether or not seaworthiness was a *condition precedent* to exoneration in any conceivable case under the Fire Statute.

The Circuit Court of Appeals in the present case clearly overlooked the significance of its finding (in accord with that of the District Court) that the fire and consequent cargo damage resulted "inevitably" (R., p. 786, Opinion, C. C. A. 2) from the grossly unseaworthy condition of the "Galileo" on sailing. In so doing it failed to apply the doctrine in *Pendleton* v. *Benner Line*

(*supra*) and *The Malcolm Baxter, Jr.* (*supra*), that the breach of warranty in failing to provide a vessel which was seaworthy on sailing so far as due diligence could make her so was personal neglect. The entire opinion of the Circuit Court of Appeals down to the last paragraph on page 789 of the record, is devoted to discussing a question which is not involved here, viz; whether an owner of an unseaworthy ship is entitled to the protection of the Fire Statute when a fire and consequent cargo damage do NOT result from the neglect to make her seaworthy and safe from fire so far as ordinary care could make her so. The Court seems to have been confused by the decisions which hold that "due diligence to make seaworthy" under Section 3 of the Harter Act is a condition precedent to exemption from perils not resulting from unseaworthiness and to have overlooked the fact that the warranty existed long before the Harter Act existed.

The loss here resulted "inevitably" from the unseaworthiness. In other words in the present case no fortuitous fire or peril was encountered; the loss was "inevitable" from the dangerous condition on sailing. All that the Circuit Court of Appeals considered in reaching its erroneous conclusion was a question which is not involved here. It is only in the last two paragraphs (R., pp. 789-790) of its opinion that the Circuit Court of Appeals discusses the neglect of the shipowner. It then omits to mention the most important fact in the case, viz; that on its concurrent findings of fact already made the cargo damage resulted inevitably from the unseaworthiness and dangerous fire hazard existing on sailing, and that they were observable by an unskilled man. On this finding the shipowner as a matter of law was guilty of personal neglect in failing to comply with his personal warranty that on sailing the vessel would be seaworthy so far as due diligence could make her so.

II.

The decision in this case is in conflict with the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, which the Circuit Court of Appeals in the present case endeavors in its opinion to distinguish as follows (R. 789):

> "In the case of *The Malcolm Baxter, Jr.*, as appears from the decision of the district court (not officially reported), the vessel's hull had defects which an inspection would have disclosed but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any waranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity'. So understood the case is quite in line with earlier authorities. In the case at bar, however, the lack of diligence was that of the chief engineer and the owner was not only not in privity with the engineer's default but was found by the court to be free from personal neglect. Therefore, 'The Malcolm Baxter' would not be inconsistent with allowing limitation under section 4283, and is even less inconsistent with allowing exoneration under section 4282."

The Circuit Court of Appeals attempted in its opinion to distinguish this case on the facts from that of *The Malcolm Baxter, Jr.*, 277 U. S. 323, so as to sustain a proposition of law which it laid down in its opinion as follows:

> "Unseaworthiness of a vessel has nothing to do with limitation of liability by the owner unless it exists with the owner's privity or knowledge. Lack of diligence to make the vessel seaworthy, is, therefore, immaterial unless it is within the owner's privity or knowledge" (R., pp. 788, 789).

The language just quoted, in so far as it purports to cover a case in which the shipowner has breached his personal contract that the vessel on sailing will be seaworthy so far as due diligence can make her so, is flatly in conflict with the decisions of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323; *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139 and *Richardson* v. *Harmon*, 223 U. S. 96.

In *The Malcolm Baxter, Jr.*, 277 U. S. 323, at page 331, this Court said:

> "Both courts below agreed that the 'Baxter' was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and Acts permitting limitation of liability to the vessel and pending freight. R. S. Sections 4282-4289."

In *Pendleton* v. *Benner Line*, 246 U. S. 353, at page 357, this Court said:

> "It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not."

In *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, at page 149, this Court said:

> "But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitations acts do not apply. *Pendleton* v. *Benner Line*, 246 U. S. 353."

In *Richardson* v. *Harmon*, 223 U. S. 96, at page 106, this Court said:

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect *and contracts.*" (Italics ours.)

This entire subject has been under a full discussion in this Court, not only in *Pendleton* v. *Benner Line*, but also in *Luckenbach* v. *McCahan Sugar Company*, as a reference to the opinions of the District Court, Hough, *J.*, and the Circuit Court of Appeals in the *Luckenbach* case will show. (See *The Julia Luckenbach*, 235 Fed. 388, for the District Court's opinion, page 389; for the Circuit Court of Appeals opinion, p. 396.)

The attempt of the Court below to distinguish the *Malcolm Baxter, Jr.* case on the facts is not justified. The reference in its opinion (R., p. 789) to an absence of a warranty of seaworthiness in the bill of sale, is wholly immaterial, because the suit in the *Malcolm Baxter, Jr.* case was on a contract of affreightment, and not on the bill of sale. Any warranty in the bill of sale can have no greater evidential effect in a suit for breach of a contract of affreightment than a certificate of seaworthiness. Indeed, it would not be of as much probative value as a certificate of seaworthiness, because the warranty in the bill of sale is that of an owner, who would not necessarily be a skilled person, whereas, a certificate of seaworthiness is a statement of a skilled person. But it is settled by a long line of authorities that certificates of seaworthiness are not proof of due diligence. See *Bank Line* v. *Porter*, 25 Fed. (2d) 843 (C. C. A. 4), where the authorities are collected.

The Circuit Court of Appeals says (R., p. 789) that:

> "In the case of *The Malcolm Baxter, Jr.*, as appears from the decision of the District Court (not officially reported), the vessel's hull had defects which an inspection would have disclosed and the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's and the loss resulting from unseaworthiness was within the owner's 'privity'."

The Court thus mistakenly assumed that in the *Malcolm Baxter, Jr.* case there was no survey of the vessel before she sailed from New Orleans. But that there was such survey appears from the opinion of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. at page 332 (and from numerous places in the Record in that case), where this Court said:

> "Respondents had purchased the vessel about one month before she sailed. At that time she was unseaworthy, due to a 'hog' or camber in her keel, a structural weakness dangerous to the ship in heavy weather, which later caused the leak and made necessary the repairs at Havana. Following the purchase and before sailing from New Orleans a survey was made by the owner, which appears not to have disclosed her condition, but both courts below agree that the fact of her unseaworthiness could have been discovered by due diligence."

It is abundantly clear from the foregoing quotation that this Court in the *Baxter* case fully understood that there had been a survey before the vessel sailed from New Orleans and that in using the language criticised by the Court below, this Court used such language with that fact in mind. The Court below also overlooked the fact that in its opinion the District Court in the *Baxter* case found that a surveyor of the New Orleans Board of

Underwriters granted a certificate of loading and that a surveyor, called Thompson, also looked over the vessel. The District Court found that Thompson's survey was not as careful as it should have been. It said: "The chances are good that the defects would have been found at New Orleans had anyone cared enough to look for them." (See the Record in the *Malcolm Baxter, Jr.* case, on file in this court, October Term, 1927, No. 459, Volume I of the Transcript of Record, at pp. 241-243.) The fact is, therefore, that the amount of diligence exercised by the owner in the *Malcolm Baxter, Jr.* case was greater than the diligence exercised by the respondent here. In addition, in the *Malcolm Baxter, Jr.* case, the owner was held liable because its surveyor did not make as careful an examination as he should, whereas here, the Chief Engineer knew of the dangerous condition before the ship sailed.

The respondent should have had in mind that the coal which had been in its ship would involve the risk of fire. In *Fiumana* v. *Bunge,* L. R. (1930), 2 K. B. 47, it is said (at p. 60):

> "The practice of carrying bunkers on the voyage out and back may always I think involve this risk of fire. * * *
>
> In the present case the possibility of coal deteriorating before the grain is loaded cannot be absent from the shipowner's mind. I imagine the practice of bunkering in this way is adopted from motives of economy."

In *The Malcolm Baxter, Jr.,* 277 U. S. 323, at page 331, this Court said:

> "Both courts below agreed that the 'Baxter' was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient

> ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and Acts permitting limitation of liability to the vessel and pending freight. R.S. Sections 4282-4289."

As R.S. 4282, the Fire Statute, is part of the same Act as R.S. 4283, the limitation statute, the two sections should receive the same construction. Moreover, the reasoning followed by the courts in denying the benefits of Section 4283 to an owner who has breached his warranty of seaworthiness, applies with even greater froce to a case where a shipowner seeks the benefit of the Fire Statute to avoid liability for a fire which resulted from his breach of an express warranty of seaworthiness. In *La Bourgogne,* 210 U. S. 95, this Court pointed out that the Limitation Statute is more favorable to the shipowner than the Fire Statute. Discussing the previous rulings in *Providence & N. Y. S.S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578, this Court said (210 U. S. at p. 122):

> "In determining the case it became necessary to decide whether, if there was negligence of the owner of a vessel in case of fire within the meaning of the first section of the act of 1851, such negligence was the necessary equivalent of privity and knowledge of the owner, as expressed in the third section of the act. It was held that the two provisions were not necessarily coterminous, that negligence under the first section of the act might exist so as to prevent the unqualified limitation given by that section, and yet the owner of the vessel be entitled to the more limited exemption given by the third section, which depended upon the absence of privity or knowledge. In other words, it was decided that although a loss might have happened by the negligence of the owner of the vessel, such loss might yet not have been occasioned with the knowledge or privity of such owner."

Under such circumstances as those here presented, we submit that the vessel owner is precluded from securing the benefits of the Fire Statute (R. S. 4282) which is part of the same Act as R. S. 4283 (Act of March 3, 1851) dealing with a carrier's right to a limitation of liability. It is well settled that a shipowner will not be afforded a limitation of his liability under the provisions of R. S. 4283 where a loss is caused by breach of the terms of his personal contract. *Richardson* v. *Harmon*, 222 U. S. 96; *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139; *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334. This Court held in three of the foregoing cases that the charter parties involved, containing an express warranty of seaworthiness, were the personal contracts of the owners.

In *The Loyal*, 204 Fed. 930 (C. C. A. 2), and *The Katie*, 24 Fed. 2nd 410 (C. C. A. 3), it was held that breach of the warranty of seaworthiness implied by law in the contract of the parties, took from the owner the right to limit his liability against losses arising from the unseaworthiness.

III.

Conflict with the Ninth Circuit as to "delegability".

The decision in this case of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Bethlehem Co.* v. *Gutradt Co.*, 10 Fed. (2d) 769. In that case the Gutradt Company, as cargo owner, sued the Pacific Mail Company, as vessel owner, for cargo

damage. The negligent act of a repairman, an independent contractor, employed by the vessel owner, in repairing a clapper valve, which became below the water line when cargo was loaded, caused water to enter the holds and damage the cargo. The shipowner contended that he had delegated that duty of preparing the vessel for sea to the repairman and the ship's officers. The repairman contended that the cargo "damage was caused by the negligence of the owner in failing to inspect the valve before loading the cargo" (10 Fed. 2d at p. 772). The Court said (10 Fed. 2d at p. 771):

> "As between the Pacific Mail Company and the Gutradt Company, the duty of making the ship seaworthy *was a nondelegable one.*" (Italics ours.)

IV.

The *duty* of the shipowner was to perform his warranty that due diligence would be used to supply a seaworthy ship. The Fire Statute, like exceptions in a contract of carriage, limits the *liability* for damages from causes beyond the shipowner's control, but does not limit the *duty* of the owner to use care to supply a seaworthy ship. Indeed, an attempt by contract to reduce that duty below the use of due diligence would be illegal by Section 2 of the Harter Act.

In *The Caledonia,* 157 U. S. 124, this Court said (at p. 137):

> "As is well said by counsel for the appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner and do not in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel."

And in *The Malcolm Baxter, Jr.*, 277 U. S. 323, at page 331, this Court said:

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. *The Caledonia*, 157 U. S. 124; *The Europa* (1908), page 84; *Thorley* v. *Orchis S. S. Co., Ltd.* 1907), 1 K. B. 660; *Kish* v. *Taylor* (1912), A. C. 604, 618."

And in a later passage this Court said:

> "But for all damages legally attributable to the breach of warranty of seaworthiness petitioners may recover. *The Caledonia, supra*" (p. 333 of 277 U. S.).

The unseaworthiness, which was concurrently found by the Courts below, displaced the contract of affreightment in so far as damage was caused by the unseaworthiness.

The effect of the decisions of this Court in the *Malcolm Baxter* case, *supra*, and in *Pendleton* v. *Benner Line*, 246 U. S. 353, is to place an exoneration from or limitation of liability by statute in the same category as a limitation of liability by contract in so far as losses caused by breach of the warranty of seaworthiness are concerned.

This Court in the *Malcolm Baxter* case did not find it necessary to go beyond the principle laid down in *The Caledonia* that an exemption from liability does not protect a shipowner from the consequences of a breach of duty in failing to use "due diligence" (277 U. S., p. 331) to make his ship seaworthy at the loading port. This failure was treated by this Court as a personal neglect which deprived the shipowner of the benefit of the limitation statute.

In addition to the warranty of seaworthiness implied by the maritime law in every contract of affreightment (*The Edwin I. Morrison,* 153 U. S. 199), all of the bills of lading in the present case which were signed by the respondent (or issued in its name by its New York agents pursuant to general authority given by the respondent, R., p. 698), provide that the petitioners' goods would "be transported by the *good* steamship 'Galileo'" (R. 698), and that "the carrier shall not be liable, as carrier or otherwise, for any loss * * * by * * * unseaworthiness of the steamer, whether existing at time of shipment or at the beginning of the voyage, provided *the owners* have *exercised due diligence to make the steamer seaworthy*" (R. 698). (Italics ours.)

The bill of lading provisions quoted form an unequivocal agreement between the parties concerning their rights and liabilities and that agreement, not being contrary to any public policy, entirely displaces any statutory benefit which the carrier would otherwise have had under R. S. 4282. The bills of lading contain a clause reading as follows:

> "It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes" (R. p. 698).

This clause does not indicate the slightest intention to modify the warranty of seaworthiness. Such an intention must be in clear and unambiguous words. *The Caledonia,* 157 U. S. 124; *The Carib Prince,* 170 U. S. 655. Indeed, the clear intent of the clause is that the warranty should in no event be considered modified

further than is permitted by the Harter Act, which is referred to in the class as "the Act of Congress of the United States, approved on the 13th day of February, 1893." The warranty, therefore, remains in full force and effect, except in so far as it was modified by the bill of lading exception of loss from unseaworthiness provided the owners have exercised due diligence to make the vessel seaworthy.

The Caledonia, 157 U. S. 124;
The Carib Prince, 170 U. S. 655;
The Malcolm Baxter, Jr., 277 U. S. 323.

The Fire Statute, R. S. 4282, is not mentioned in the clause. As clauses in bills of lading are strictly construed against the shipowner—*Calderon* v. *Atlas S. S. Co.,* 170 U. S. 272—and particularly, as clauses tending to reduce the shipowner's duty to furnish a seaworthy ship may not be enlarged by inference, the inclusion of R. S. 4282 in the clause may not be had by implication.

The Caledonia, 157 U. S. 124;
The Carib Prince, 170 U. S. 655.

The principle of "personal contract" applies here. The respondent being a corporation was required, of course, to act through an agent, and the respondent's own uncontradicted evidence is that these bills of lading were executed or authorized by its duly authorized New York agents (R., pp. 422-423). The doctrine of "personal contract" was applied in the following cases where the contracts were executed by agents:

The Etna Maru, 33 Fed-2d-232, p. 233 CCA 5
Luckenbach v. *McCahan Sugar Co.,* 248 U. S. 139;
Great Lakes Towing Co. v. *Mill Transp. Co.,* 155 Fed. 11 (C. C. A. 6);

American Co. v. *Davison Lumber Co.*, 240 Fed. 126 (C. C. A. 2);
Gokey v. *Fort*, 44 Fed. 364 (S. D. N. Y.).

In *The Soerstad*, 257 Fed. 130 (S. D. N. Y.), Judge Learned Hand (now Judge of the United States Circuit Court of Appeals for the Second Circuit), referring to the effect of an express warranty in a contract on the warrantor's right to limitation, said (at p. 130):

> "A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary. And so the action on warranty was originally a pure action of tort' (Ames, History of Assumpsit, 2 Harv. L. R. 1, 8), and arose a century before action on the case for assumpsit. The action sounded indeed in deceit (Y. B., 11 Ed. IV, 6, plac. 11), and it was not till 1778, in *Stuart* v. *Wilkins*, 3 Doug. 118, that assumpsit appears to have been used on a seller's warranty.
>
> Regarded in this way, which is probably the correct way historically, it follows inevitably that a breach of warranty should be held to be with the warrantor's privity, because all the elements of the cause of action are 'done, occasioned, or incurred' by him personally; that is to say, he

> personally gives the false assurance, he intends the warrantee to rely upon it, and the loss arises from the mistaken reliance, as he knows it will. *Thus he personally occasions the loss.*" (Italics ours.)

In *Richardson* v. *Harmon*, 222 U. S. 96, a petition was filed by the owners of a barge to limit their liability under Section 4283 for damage occasioned by a collision of their barge with an abutment of a railroad drawbridge. This Court carefully considered the history and purpose of the Limited Liability Act and its amendments, and in the course of the opinion said (at p. 106):

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."

IV.

The decision is in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Tucker Co.* v. *Southwark Co.*, 24 Fed. 2nd 410, and of this Court in *The Wildcroft*, 201 U. S. 378, *The Caledonia*, 157 U. S. 124, *Pendleton* v. *Benner Line*, 246 U. S. 353, and in *Luckenback* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, that a general statutory or contractual exemption from liability for damage during the contract period from a cause beyond the shipowner's personal control does not exempt him from damages for breach of his personal warranty or representation of fact, made at the time he signs the contract, that at that time due diligence has in fact been exercised by him and his servants to make his vessel seaworthy, and that such diligence will continue until the vessel sails from her loading port.

Conclusion.

This Court should issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the cause of *Earle & Stoddart, Inc., et als.*, v. *Ellerman's Wilson Line, Ltd., Owner of S. S. "Galileo".*

Dated, New York City, March 17, 1932.

Respectfully submitted,

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

THE COURT PRESS, INC.

FILE COPY

FILED
APR 11 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 20

EARLE & STODDARD, INC., *et als.*, Owners of Cargo on the Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

SUBJECT INDEX.

PAGE

Material omissions in respondent's statement of the concurrent findings..... 1

The Fire Statute does not bar recovery of such damages to cargo as resulted "inevitably" from a breach by the shipowner of the warranty of seaworthiness. Such breach constitutes "neglect". *The Etna Maru,* 33 Fed. 2nd 232, 234 (C. C. A. 5). Especially so where, as here, reasonable care was not used to correct the dangerous condition before sailing. It is entirely immaterial, so far as the damages from unseaworthiness are concerned, what the antecedent conditions were (whether a negligent act of the chief engineer or otherwise) which led to the shipowner's failure to supply a seaworthy vessel. And certainly this is so where the effects of such earlier negligence were observable by the shipowner or an unskilled man in the loading port, and could have been remedied before sailing..... 3

TABLE OF CASES:

Caledonia, The, 157 U. S. 124..... 3

Capitol Transportation Co. v. *Cambria Steel Co.,* 249 U. S. 323..... 3

Carib Prince, The, 170 U. S. 655..... 3

Charbonnier v. *United States,* 14 F. (2d) 174..... 5

Etna Maru, The, 20 F. (2d) 143..... 4, 6

Etna Maru, The, 33 F. (2d) 232 (C. C. A. 5)..... 4, 6

Luckenbach v. *McCahan Sugar Refining Co.,* 248 U. S. 139..... 3

Malcolm Baxter, Jr., The, 277 U. S. 323..... 3

Pendleton v. *Benner Line,* 246 U. S. 353..... 3

Walker v. *Transportation Co.,* 3 Wall. 150..... 5

IN THE

Supreme Court of the United States

EARLE & STODDARD, INC., *et als.*, Owners of Cargo on the Steamship "GALILEO",
Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",
Respondent.

October Term, 1931.
No. 809.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

In order that the true issue may not be obscured, we quote the following from the opinions below which has been omitted altogether from the statement of the case on pages 1 to 3 of respondent's brief.

The District Court:

> "The libellants contend that not only was the ship not seaworthy when she commenced the voyage, but that respondent had not exercised due care to make her so, and that therefore the respondent is liable for the loss of the cargo; while the respondent relies on the defense of the Fire Statute (U. S. C. A., Title 46, Sects. 182, 187)." (R., p. 727.)
>
> "There remains for consideration the question whether respondent is liable on account of

the unseaworthiness caused by the negligent act of the chief engineer in loading a new supply on the hot coal. Libellants claim that respondent failed in a non-delegable duty to have reasonable care exercised to make the vessel seaworthy before her departure. *Concededly at the commencement of the voyage the 'Galileo' had within her a condition so dangerous that a bunker fire was inevitable and did in fact result within six hours."* (R., p. 735.) (Italics ours.)

[The respondent admitted in its answer that "all the loss and damage" sued for was caused by such bunker fire (R., p. 69).]

"Libellant's contention that respondent is liable for the loss even though it was caused solely by the negligence of the chief engineer is based on the theory that *respondent was under a contractual obligation to the shippers that reasonable care be exercised by all concerned to make the vessel seaworthy before she left port.* It is not contended that the doctrine of *respondeat superior* makes respondent liable, but that the negligence of the chief engineer caused a breach of contract on the part of the owner." (R., p. 738.) (Italics ours.)

"Libellants construe the statute to mean that *the exemption is granted only upon condition that the owner's general maritime obligation in regard to the seaworthiness of the vessel at the commencement of the voyage be fulfilled to the extent of having due care exercised by all connected with it,* whether the owner's representatives or the ship's officers; in other words, that the distinction which the statute makes between the owner's neglect and the ship officers' negligence has no application to

matters affecting the seaworthiness of the vessel at the commencement of the voyage" (R., p. 738). (Italics ours.)

The Circuit Court of Appeals (R., p. 789):

> "The new coal was taken on a day or two before the 'Galileo' sailed, so that at the commencement of her voyage there existed within her, as the court expressly found, a condition so dangerous that a bunker fire was inevitable. Therefore, within authoritative definitions of seaworthiness (*The Sylvia,* 171 U. S. 462, 464; *The Southwark,* 191 U. S. 1, 9) the 'Galileo' was unseaworthy when she sailed, and this was due to her chief engineer's negligence."

Counsel's statement (Respondent's Brief, p. 2) that we have been guilty of a misstatement and that our argument is contrary to "an express finding" of both Courts below, is entirely without support. When his reasons for that statement are examined, it is obvious that they are based on the assumption that by the device of inserting in the bill of lading a clause incorporating the limitation statute, a shipowner may reduce his obligation to make a ship seaworthy below that of using due diligence to make her so. Such an assumption is contrary to the decisions of this Court in *Pendleton* v. *Benner Line,* 246 U. S. 353; *The Malcolm Baxter, Jr.,* 277 U. S. 323; *The Caledonia,* 157 U. S. 124; *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139; *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U. S. 323, and *The Carib Prince,* 170 U. S. 655. We agree that respondent's contention is in accord with the conclusion of law of the Courts below, and respectfully point out that they have thus in effect

flatly repudiated the foregoing decisions of this Court. Counsel for respondent is in error, however, in referring, at page 2 of his brief, to this conclusion of law as a finding, because it is in no sense a finding of fact. On the contrary, it is the conclusion of law which we pray this Court to review. It is in conflict with decisions of this Court and decisions in other circuits, as we have shown in our petition and brief, particularly with that of the Fifth Circuit in *The Etna Maru,* 33 F. (2d) 232, affirming 20 F. (2d) 143.

Neither in the petition for certiorari, nor in the brief in support thereof, has any contention been made by us that the owner had "waived the Fire Statute by the bills of lading", or had "contracted themselves into a greater and unlimited liability". What counsel for respondent says with reference to waiver is therefore irrelevant. Our position was stated by the Circuit Court of Appeals in its opinion in the present case as follows (R., p. 787):

> "Conceding this to be the law when the ship is seaworthy at the commencement of her voyage, the libellants contend that the rule is different when she sets out in an unseaworthy condition and due diligence has not been used by the ship's officers to make her seaworthy."

To which the Court should have added:—and when the only damages sought to be recovered are those resulting inevitably from the unseaworthiness, and when ordinary care by inspection in the loading port by the shipowner, or even by an unskilled man, would have disclosed the unseaworthy condition. In other words the misapprehension under which counsel for respondent labors is that

he treats the Limitation Statute as a bar to the recovery of such damages as directly and inevitably result from unseaworthiness.

Walker v. *Transportation Co.*, 3 Wall. 150, upon which counsel apparently places his chief reliance, is not in point, because in that case the vessel was not found to be unseaworthy. Therefore, of course, no breach of the warranty was involved, and no question as to liability for such damages as flow from unseaworthiness was raised or passed upon. Nor was any question raised, or involved, in the *Walker* case as to whether the neglect of the shipowner to supply a vessel which was seaworthy, so far as due diligence could make her so, constituted neglect of the shipowner within the exceptive proviso in the Fire Statute.* This was clearly pointed out by the Circuit Court of Appeals for the Fourth Circuit in *Charbonnier* v. *United States*, 14 F. (2d) 174, at page 177 (see our brief in support of the petition, at page 17, where we quote a passage from *Charbonnier* v. *United States*, distinguishing *Walker* v. *Transportation Company*). Counsel for respondent has made no attempt in his brief to meet that obvious ground of distinction.

There is no justification for the statement of counsel for respondent, at the bottom of page 2 of his brief, that

> "the alleged quotation from the bills of lading on page 4 of Petitioners' Brief is a distortion of

---

* Yet those are the issues raised by the facts in the present case, and are so stated by the Circuit Court of Appeals in its opinion, and its conclusion or legal inference from those facts is precisely the opposite of that drawn on the same facts by the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 Fed. (2nd) 232.

> the exceptions clause appearing in the bills of lading."

See Record, page 698, for the original of the bill of lading. We merely omitted irrelevant parts of a very long exceptions clause in a bill of lading which as drafted is most difficult to read. It is significant that counsel does not specify a single word which we should have included.

In referring to a passage quoted from the District Court's opinion in *The Etna Maru,* 20 F. (2d) 143, counsel for respondent says:

> "The exact contrary has been held by this Court in many cases. See the cases cited on pages eight and ten of this brief" (Respondent's Brief, p. 12).

Not one of these cases supports respondent's statement. An examination of the opinion of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 F. (2d) 232, shows plainly that the *ratio decidendi* of that Court's decision is that the Fire Statute does not exempt the shipowner from such damages as flow from unseaworthiness. The Court said:

> "Appellant concedes, apparently, that if the charter had been entered into personally, the warranty of seaworthiness would have barred the relief of the limited liability laws."

And again the Court said:

> "it is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against

the ship. *Richardson* v. *Harmon*, 222 U. S. 96; *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334; *The Malcolm Baxter, Jr.*, 277 U. S. 323."

Respectfully submitted,

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

FILE COPY

OCT 1 1932
CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 20.

EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

BRIEF FOR PETITIONERS.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel for Petitioners.

SUBJECT INDEX.

PAGE

Opinions below 1

Jurisdiction of this Court 1

Statement of the case 2

Concurrent findings below 5

Questions presented to this Court 13

ARGUMENT:

I—The exception of damage from fire in the first section of the Limitation Act of 1851 is inapplicable to damage which results inevitably from unseaworthiness and from carelessness in the loading port (while the vessel is still under the control of the shipowner's managing agent in that port) in preparing the vessel for sea to make her ordinarily safe against outbreak of fire. Especially so if the dangerous condition is observable by even an unskilled person and has, in fact, been discovered and reported by several such unskilled persons, longshoremen, who, however, had no authority from respondent to incur the expense of remedying the unseaworthy condition 16

The Etna Maru, 33 Fed. 2nd 232 (C. C. A. 5) 18

The Malcolm Baxter, Jr., 277 U. S. 323 20

Other Decisions of this Court 24

Decisions of English Courts 32

Decisions of Federal Courts in other Circuits .. 34

Decisions cited by Circuit Court of Appeals distinguished 40

Moreover, so far at least as concerns the use of ordinary care in the loading port in pre-

PAGE

paring a vessel for sea to protect her against outbreak of fire during the voyage, Congress did not intend, by granting in the Limitation Act of 1851 certain exemptions against loss by fire, to give preferential treatment or immunity to a common carrier which, although it has issued bills of lading under its corporate name, commits or delegates its entire personal duty in the loading port under an express warranty of seaworthiness to a managing agent and a vessel officer there, as against a shipowner whose regular corporate officers perform that duty themselves or actively supervise its performance, and who are interested enough to observe personally the conditions existing on board the vessel before they order her to proceed to sea with the cargo. Such a preference would put a premium on carelessness in management and in preparation for the voyage, and on ships' managers keeping themselves in ignorance of observable dangerous conditions..... 45

Consequently, a failure or neglect to perform such duty constitutes neglect of the shipowner himself. Especially so, if in addition to an express warranty that the vessel will in fact be seaworthy on sailing so far as ordinary care can make her seaworthy, there is an additional special express warranty by the shipowners that they themselves ("the owners", R. 30A) will exercise the due diligence necessary to make the vessel seaworthy..... 46

I-A—The Fire Statute (Section 4282 R. S., re-enacting Section 1 of the Limitation Act of 1851) is not even mentioned in the forms of bills of lading covering most of the cargo in this case. That statute, however, being part of the law of the land, is impliedly incorporated in every contract, if applicable. Its express incorpora-

PAGE

tion by an independent clause in some of the bills of lading, therefore, has no legal effect whatever as to those contracts so far as a suit in the United States is concerned unless the facts are such that in the absence of such clause the Fire Statute would be applicable. The purpose of the insertion of that clause incorporating the Fire Statute is to enable the shipowner to have it read as part of the contract (if applicable) in the event suit is brought on the bill of lading in a foreign country. The Fire Statute does not deal with or even mention loss from unseaworthiness..... 47

Furthermore, the shipowner in the present case drafted and inserted a separate and distinct clause in these bills of lading dealing with the subject of seaworthiness and loss from unseaworthiness, and did not provide therein that the Fire Statute or any of its language should reduce or impair the plainly expressed warranty that the vessel would in fact be seaworthy on sailing so far as exercise of due diligence could make her so..... 49

Decisions of this Court..... 50

Decisions of English Courts..... 53

II—Independently of the foregoing point, the Fire Statute is inapplicable to shipowners' personal contracts. The contract in this case was (as the Circuit Court of Appeals, without finding the fact one way or the other, assumed for purpose of argument) a personal contract of the respondent corporation, and it is therefore liable for its simple breach, even assuming there was no negligence of respondent..... 58

Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139..... 59

Pendleton v. *Benner Line*, 246 U. S. 353..... 59

Harmon v. *Richardson*, 222 U. S. 96..... 59

Other Decisions 61

PAGE

The respondent was doing business in the loading port as a common carrier under its corporate name. Its regular corporate officers at Hull personally participated in and approved by cables and correspondence the booking of this cargo, the fixing of the rates of freight, and the issuing of the bills of lading to these petitioners. Furthermore, the contracts evidenced by the forms of bills of lading covering most of the cargo were entered into in its name through its New York managing agent..... 62

It has long been settled by this Court that the Limitation Act of 1851 (which includes the Fire Statute as Section 1) is inapplicable to shipowners' personal contracts..... 63

The Circuit Court of Appeals held that the bald incorporation of the Fire Statute by an independent clause in certain of the bills of lading changed and reduced as to those bills of lading the terms of the warranty of seaworthiness which was covered independently and fully in a separate clause. No other ground is given for the court's decision on that point. But obviously, the Fire Statute being inapplicable, its mention or incorporation by an independent clause in those contracts has no legal effect unless the facts would otherwise make it applicable, and does not reduce the shipowner's personal duty or warranty as expressed in a separate clause defining the duty as to seaworthiness.... 65

Moreover, the interpretation adopted by the Circuit Court of Appeals would reduce the obligation of the shipowner as to seaworthiness below the minimum of use of ordinary care to make seaworthy, which is enforced on grounds of public policy for the safety of life and property at sea. That interpretation, if adopted by

PAGE

this Court, would also apply to all limitations of liability under the Act of 1851, whether or not a fire is involved, and would impair the duty of shipowners in loading ports as repeatedly announced by this Court 66

Conclusion 66

Appendix A, Copies of statutes involved i

Appendix B, Pertinent bill of lading clauses iii

TABLE OF CASES CITED:

PAGE

Annie Faxon, The, 75 Fed. 312 (C. C. A. 9)..... 38
Arkell & Douglas v. *United States*, 13 Fed. (2d) 555, at page 558 (C. C. A. 2)..... 44

Bank of Kentucky v. *Adams Express Co.*, 93 U. S. 174, at pages 180, 183.....26, 46, 50
Bank Line v. *Porter*, 25 Fed. (2d) 843; certiorari denied, 278 U. S. 623.....22, 33, 35, 38
Benjamin Noble, The, 232 Fed. 382, 397..... 61
Bethlehem Co. v. *Gutradt Co.*, 10 Fed. (2d) 769..... 38
Boston Marine Insurance Co. v. *Metropolitan Co.*, 197 Fed. 703 (C. C. A. 9)..... 61
Bowring v. *Thebaud*, 56 Fed. 520, at page 523.....20, 41

Caledonia, The, 157 U. S. 124
8, 19, 24, 25, 30, 47, 50, 51, 57, 65
Capitol Transportation Co. v. *Cambria Steel Co.*, 249 U. S. 334, at page 336.....24, 63
Carib Prince, The, 170 U. S. 655.....24, 51, 57, 65
Charbonnier v. *United States*, 45 Fed. 2nd 166....35, 38, 39
Chattahoochee, The, 173 U. S. 540, 554..... 54
Chesapeake Lighterage Co. v. *Baltimore Co.*, 40 Fed. (2d) 394 (C. C. A. 4)..... 34
Christopher v. *Grueby* (*The Commonwealth*), 40 Fed. (2d) 8 (C. C. A. 1)..... 36
Cohn v. *Davidson*, 2 Q. B. Div. 455..... 41
Colima, The, 82 Fed. 665..... 61
Compania de Navigacion La Flecha v. *Brauer*, 168 U. S. 104..... 50
Craig v. *Continental Insurance Co.*, 141 U. S. 638....39, 42

Drill Boat No. 4, The, 233 Fed. 589, 595 (Dis. of Mass.) 61

Earle & Stoddart v. *Ellerman's Wilson Line, Ltd.*, 45 Fed. 2nd 231, affd. 54 Fed. 2nd 913 (C. C. A. 2).. 1
Edwin I. Morrison, The, 153 U. S. 199.....8, 16, 24, 27
84-H, The, 296 Fed. 427 (C. C. A. 2)..... 44
Etna Maru, The, 20 Fed. (2d) 143; affirmed 33 Fed. (2d) 232 .....8, 9, 15, 18, 19
Eugene Vesta, The, 28 Fed. 762..... 20

PAGE

Fiumana v. *Bunge*, L. R. (1930), 2 K. B. 47..... 66
Ford v. *Williams*, 21 How. 287..... 62

Gokey v. *Fort*, 44 Fed. 364, at page 366..... 63
G. R. Booth, The, 171 U. S. 450..... 28
Great Lakes Towing Co. v. *Mills Transportation Co.*, 155 Fed. 11, at page 20..... 62

Higgins v. *McCrea*, 116 U. S. 671..... 62
Higgins v. *Senior*, 8 Mees. & W. 844..... 62

Ingram & Royle v. *Services Maritimes du Treport* (1914), 1 K. B. 541, at page 554..... 55
International Navigation Co. v. *Farr Co.*, 181 U. S. 218 .....12, 20, 27, 46, 57
Irrawaddy, The, 171 U. S. 187, at pages 190, 195.....54, 55

Jason, The, 225 U. S. 32, 49, 52, 54..... 54
In re Jeremiah Smith & Sons, 193 Fed. 395 (C. C. A. 2) 61

Kaufer Co. v. *Luckenbach*, 294 Fed. 978..... 20
Keene v. *The Whistler*, Fed. Cas. No. 7645 (D. Cal.)... 39
Knott v. *Botany Mills*, 179 U. S. 69, 73..... 54

La Bourgogne, 210 U. S. 95.....43, 55
Lennard's Carrying Co. v. *Asiatic Petroleum Co.* (1915), A. C. 705..... 33
Liverpool Navigation Co. v. *Brooklyn Terminal*, 251 U. S. 48, 52..... 19
Lord v. *Goodall S. S. Co.*, 4 Sawyer 292, Fed. Cas. No. 8506 .....39, 43, 44
Louis Dreyfus & Co. v. *Tempus Shipping Co. L. R.*, 1931, A. C. 726, 751, 752.....53, 54
Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139 .....17, 24, 39, 56, 58, 59

McFadden v. *Blue Star Line*, 10 Asp. N. S. 55, 58.... 20
McFadden v. *Blue Star Line* (1905), 1 K. B. 697, at page 704..... 40
McPhail v. *Williams*, 41 Fed. 61, at page 62..... 63

Malcolm Baxter, Jr., The, 277 U. S. 323, 331
9, 19, 20, 21, 22, 23, 24, 28, 42, 55, 56, 65

PAGE

In re Meyer, 74 Fed. 881, 885 20
In re Myers Navigation Co., 57 Fed. 240 44

Newport, The, 7 Fed. 2nd 452, 454 20
No. 6, The, 241 Fed. 69, 71 (C. C. A. 2) 61

Oneida Navigation Co. v. *L. Richardson & Co.,* 282 Fed. 241, at page 243 41
Oregon Lumber Co. v. *Portland & Asiatic S. S. Co.,* 162 Fed. 912 (District of Oregon) 61

Pacific Steamship Co. v. *Peterson,* 278 U. S. 130, at page 138 37
Parsons v. *Empire Transportation Co.,* 111 Fed. 202 (C. C. A. 9), certiorari denied 183 U. S. 699 61
Paterson, Zochonis & Co. v. *Elder Dempster & Co.,* L. R. 1924, Appeal Cases 522, at page 548 (House of Lords) 33
Pendleton v. *Benner Line,* 246 U. S. 353 ..... 24, 56, 58, 59
Phenix Insurance Co. v. *Erie Transportation Co.,* 117 U. S. 312, at page 322 52
Providence & N. Y. S. S. Co. v. *Hill Mfg. Co.,* 109 U. S. 518 55
In re P. Sanford Ross, 204 Fed. 248, 250, 251 (C. C. A. 2) 61

Republic, The, 61 Fed. 109 (C. C. A. 2) 44
Richardson v. *Harmon,* 222 U. S. 96 ..... 24, 59
Royal Exchange v. *Kingsley Navigation Co.* (1923) Appeal Cases 235 32

Sanbern v. *Wright & Cobb Lighterage Co.,* 171 Fed. 449, affirmed 179 Fed. 1021 (C. C. A. 2) 61
Soerstad, The, 257 Fed. 130 31
Southwark, The, 191 U. S. 1, 9 ..... 6, 54
In re Spencer Kellogg & Sons, 52 Fed. (2d) 129, 131 .. 45
Spencer Kellogg & Co., Inc. v. *Hicks,* 285 U. S. 502 45
Strathdon, The, 89 Fed. 374 (E. D. N. Y.) 39
Strathdon, The, 94 Fed. 206, Affirmed 101 Fed. 600 (C. C. A. 2) 39

PAGE

Sumner v. *Caswell*, 20 Fed. 249, 252..... 20
Sylvia, The, 171 U. S. 462, 464.....6, 12, 17

Tempus Shipping Co. v. *Louis Dreyfus & Co.* (1931), 1 K. B. 195, at page 214.....53, 54, 57

United States v. *Charbonnier* (*The Pinellas*), 45 Fed. (2d) 174, at page 177.....35, 38, 39, 40

Virginia Carolina Chemical Co. v. *Norfolk, etc., S. S. Co.* (1912), 1 K. B. 229..... 55

Walker v. *Transportation Co.*, 3 Wall. 150..39, 40, 42, 43
Wildcroft, The, 201 U. S. 378.....27, 28

AUTHORITIES CITED:

The Fire Statute; U. S. Code, Title 46, Section 182 (R. S. 4282; Limitation of Liability Act of March 3, 1851, c. 43, Sec. 1; 9 Stats. at L. 635) quoted in full in Appendix A of this brief at page i
5, 7, 9, 13, 14, 16, 20, 26, 46, 48, 49, 50, 56, 65, 66
Judicial Code, Sec. 240 (as amended by the Act of February 13, 1925; U. S. Code, Title 28, Section 347) 1
Constitution of the United States, Article 3, Section 2, Clause 1 1
Sections 4281 and 4287, each inclusive of the United States Statutes; U. S. Code, Title 46, Secs. 181 and 187 (quoted in full in Appendix A of this brief)
47, 49, 50
British Fire Statute.....Appendix A, p. ii
Harter Act, Sec. 2.....Appendix A, p. i
Carver on Carriage of Goods by Sea, 6th edn., page 27, [7th edn., page 30].....20, 41
Story on Agency, § 160a..... 62
Mechem on Agency, §§ 769, 772..... 62
British Fire Statute.....Appendix A, p. ii
Harter Act, of February 13, 1893, Section 2
Appendix A, p. i

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 20.

EARLE & STODDART, INC., *et als.*, Owners of Cargo on Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinions below are officially reported as *Earle & Stoddart* v. *Ellerman's Wilson Line,* 45 Fed. (2d) 231, S. D. N. Y. (R. 582); and *Earle & Stoddart* v. *Ellerman's Wilson Line,* 54 Fed. (2d) 913, C. C. A. 2 (R. 641).

Jurisdiction of This Court.

A petition for writ of certiorari was filed March 19, 1932 (R. 648), and was granted by order of this Court entered April 18, 1932 (R. 648).

The jurisdiction of this Court is under Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347), and under Article 3, Section 2, Clause 1, Constitution of the United States.

Statement of the Case.

This is a libel in admiralty by owners of cargo against a shipowner who was a common carrier for breach of the contract of affreightment (R. 3). The breach alleged is the failure of the shipowner to deliver the cargo at destination (R. 24). The cargo was shipped in good condition at New York on the Steamship "Galileo" on August 27, 1926 (R. 31) and was to be carried to Hull, England, and be delivered there in like good condition (R. 24, 30A, 555). The shipowner, admitting its failure to deliver the cargo at destination, pleaded three defenses. The first defense was that "The said vessel was in all respects seaworthy, properly equipped, manned and supplied" (R. 52, paragraph "Tenth" of Answer), and that the Fire Statute (Section 4282, R. S.) exempted it from liability because an outbreak of fire on the vessel caused loss of the cargo (R. 52). There is no allegation that the outbreak of fire was without the personal design or neglect of the shipowner, excepting the bald allegation that "The vessel was in all respects seaworthy, properly equipped, manned and supplied" (R. 52). The second defense was that a clause in the bill of lading exempted it from liability for loss of cargo from outbreak of fire (R. 53). The third defense was that the amount of respondent's liability for the loss of the cargo should be limited to the value of the goods as computed according to the bill of lading valuation clause. At the trial, the respondent offered no evidence to support its allegation that the vessel was "seaworthy, properly equipped, manned and supplied" (R. 52), so far as danger from outbreak of fire was concerned. On the contrary, without ever amending its pleading, the respondent itself introduced evidence that the vessel supplied at the loading port—New York—was unseaworthy on sailing because it contained an easily-discoverable and very dangerous fire hazard; that ordinary care had not been taken before sailing

to make the vessel safe so far as outbreak of fire was concerned, and that the vessel was, therefore, unfit to proceed to sea, and that all the loss of cargo sued for resulted inevitably within six hours after sailing from a fire caused by that dangerous condition. The hazard consisted of coal which was in such a high state of progressive heating and oxidation that it burned the boots of the coal trimmers and made normal coal trimming impossible, and gave off such a strong odor of coal gas that it was observed on a coal-boat alongside the vessel (R. 329, 330, 331, 642).

The respondent is a British corporation, having its general office at Hull, England. It was doing business at New York as a common carrier under its corporate name through a subsidiary or managing agent (Ellerman's Wilson Line, New York, Inc.) which obtained cargo from shippers and entered into contracts of affreightment there on its behalf (R. 335, 343, 344, 351). The record fails to show that respondent issued any instructions to Ellerman's Wilson Line, New York, Inc., to see to it that the vessel should not be permitted to sail when she was in an unseaworthy and dangerous condition. Consequently, although the unseaworthiness was observable even by unskilled persons, both the respondent and its New York agent permitted the vessel to sail without being interested enough even to go on board her to look her over, and without making any examination whatever of the 'tween deck compartment in which the obviously dangerous fire condition existed.

Before sailing, the dangerous condition had, however, been observed and protested against by the stevedore, Magarelli, and by several shore coal trimmers who had been employed by respondent's shore agents at New York to load an additional 850 tons of coal (R. 329-330, 307) which the managing officers of the respondent at Hull had ordered by cable be carried on the "Galileo" for use at destination as bunkers on another of respondent's vessels (R. 346, 572). A large part of this excess coal was loaded in the 'tween

deck compartment as cargo on top of the "very hot" old coal. The chief engineer of the vessel, to whom the protest was made, did nothing to remedy the danger (R. 307-308). He testified (R. 316):

> "Q. He (the stevedore Magarelli) came to you and told you that the coal was hot to his feet, and you brushed him aside and told him to go about his business, I have no time to pay attention to you? Is that what happened? A. Yes, sir."

Respondent's chief shore agent at New York, Mr. Sanderson (the President of Ellerman's Wilson Line, New York, Inc.) died before trial without testifying (R. 336). Only one of the other officers of respondent's New York subsidiary or agent was called as a witness, and he testified that he did not even visit the vessel while in the loading port (New York) to see whether it was in safe condition to carry the cargo which the New York agent, on respondent's behalf, was contracting to carry. No one else took precautions before sailing to prevent outbreak of fire during the voyage. Mr. Georgi, Vice President of Ellerman's Wilson Line, New York, Inc. (R. 347) was not even called as a witness, notwithstanding the fact that he swore in verifying the answer as follows (R. 53): The "Galileo" "sailed from the port of New York bound for the port of Hull, England. The said vessel was in all respects seaworthy, properly equipped, manned and supplied" (R. 52).

On August 28, 1926, "At 12:50 P. M. the anchor was weighed and the vessel proceeded to sea" (R. 59). "At 4:35 P. M." on August 28, 1926 (R. 59), within six hours after leaving New York and while "The 'Galileo' was proceeding to sea and was in the neighborhood of Fire Island Light Vessel" (R. 56), the progressive heating of the coal reached the ignition point, and the flame became uncontrollable without help from shore (R. 62). The "Galileo" turned about and returned to New York (R. 62) and shortly afterwards, while water was being pumped in to

extinguish the fire, sank (R. 63) and, together with her cargo, became a total loss (R. 63).

Concurrent Findings Below:

The District Court:

"The libellants contend that not only was the ship not seaworthy when she commenced the voyage, but that respondent had not exercised due care to make her so, and that therefore the respondent is liable for the loss of the cargo; while the respondent relies on the defense of the Fire Statute (U. S. C. A., Title 46, Sects. 182, 187" (R. 582).

"There remains for consideration the question whether respondent is liable on account of the unseaworthiness caused by the negligent act of the chief engineer in loading a new supply on the hot coal. Libellants claim that respondent failed in a non-delegable duty to have reasonable care exercised to make the vessel seaworthy before her departure. *Concededly at the commencement of the voyage the 'Galileo' had within her a condition so dangerous that a bunker fire was inevitable and did in fact result within six hours"* (R. 587). (Italics ours.)

> [The respondent admitted in its answer that "all the loss and damage" sued for was caused by such bunker fire (R. 52).]

"Libellant's contention that respondent is liable for the loss even though it was caused solely by the negligence of the chief engineer is based on the theory that *respondent was under a contractual obligation to the shippers that reasonable care be exercised by all concerned to make the vessel seaworthy before she left port.* It is not contended that the doctrine of *respondeat superior* makes respondent liable, but that the negligence of the chief engineer caused a breach of contract on the part of the owner" (R. 590). (Italics ours.)

"Libellants construe the statute to mean that *the exemption is granted only upon condition that the owner's general maritime obligation in regard to the seaworthiness of the vessel at the commencement of the voyage be fulfilled to the extent of having due care exercised by all connected with it,* whether the owners, representatives or the ship's officers; in other words, that the distinction which the statute makes between the owner's neglect and the ship officers' negligence has no application to matters affecting the seaworthiness of the vessel at the commencement of the voyage" (R. 590). (Italics ours.)

The Circuit Court of Appeals:

"The new coal was taken on a day or two before the 'Galileo' sailed, so that at the commencement of her voyage there existed within her, as the court expressly found, a condition so dangerous that a bunker fire was inevitable. Therefore, within authoritative definitions of seaworthiness (*The Sylvia,* 171 U. S. 462, 464; *The Southwark,* 191 U. S. 1, 9), the 'Galileo' was unseaworthy when she sailed, and this was due to her chief engineer's negligence" (R. 642).

These findings rest upon the testimony of respondent's own witnesses. The negligence of the Chief Engineer at the loading port, to which the courts below refer (R. 588, 642, 643), consisted in failing to heed warnings from the stevedore and coal trimmers that the coal already in the bunker was "very hot", and in failing to prevent the continuance of the dangerous condition then existing and being aggravated by the work which the shore stevedores employed by the respondent's New York managing agent were doing in loading the new lot of respondent's coal on top of the very hot coal already in the bunker (R. 642). The respondent's managing officers in England had peremptorily ordered that the new lot of coal be loaded as bunkers for use on another vessel of the owners after arrival at

destination (R. 325). The unseaworthiness found by the courts below to exist at the time of sailing, could only be remedied by the employment of additional longshoremen to assist in shifting "250 to 300 tons of coal" to get at the seat of the dangerous condition which existed on the "Galileo" at the time she sailed (R. 62).

The defense, sustained by the Circuit Court of Appeals, was that, as a matter of law, on these undisputed facts, the shipowner was exonerated from all liability because of the so-called Fire Statute, one of the provisions of the Act of Congress of March 3, 1851, commonly referred to as The Shipowners' Limitation of Liability Statute. The language of this provision, U. S. Code, Title 46, Section 182 (R. S. 4282; Act of March 3, 1851, c. 43, Sec. 1; 9 Stats. at L. 635) is as follows:

> "Sec. 182. Loss by Fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

[See Appendix A of this brief for full text of statutes involved.]

The courts below held in effect that Congress by that Act intended to modify, and did modify, in so far as fire is concerned, the duty of a shipowner to supply a vessel which at the time of sailing from the loading port is seaworthy. The courts further held in effect that a shipowner might, without subjecting himself to any liability, permit his vessel to sail from her loading port with a dangerous fire hazard within her, although the hazard could not be remedied by the crew at sea after sailing, and although such hazard was observable before sailing, even by unskilled persons. The

Court disregarded the warranty of seaworthiness which is included in every contract of affreightment (*The Edwin I. Morrison,* 153 U. S. 199 *The Caledonia,* 157 U. S. 124), and disregarded the circumstance that there had been a breach of that warranty even as it was modified by the provision in the bill of lading limiting the shipowners' liability for unseaworthiness to the duty to use due diligence to make the steamer seaworthy. The provision of the bill of lading containing this modification is as follows:

> "The carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default * * * by fire or flood, from any cause or wheresoever occurring; * * * or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, *provided the owners* have exercised *due diligence to make the steamer seaworthy.*" (Italics ours.) (R. 30A.)*

[See Appendix B of this brief for full text of pertinent bill of lading clauses taken from Exhibit A (R. 30A) annexed to the libel, which bill of lading was used for most of the cargo.]

The court refused to follow a contrary ruling in *The Etna Maru,* 20 Fed. (2d) 143 (Dist. Texas) on the ground

---

*The above quoted clause is taken from the form of bill of lading Exhibit A (R. 30A) and appears substantially in the same language in all of the bills of lading involved in this case.

In addition to that clause, the bills of lading in the forms Exhibit A (R. 30A), Exhibit F (R. 36A), Exhibit G (R. 36C) and Exhibit Q (R. 46C) contain the following clause:

> "IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels', etc. and to Sections 4281 and 4287, each inclusive, of the United States Statutes" (R. 30A).

Ten of the bills of lading, Exhibit B (R. 32A), Exhibit E (R. 34B), Exhibit I (R. 38C), Exhibit H (R. 38A) Exhibit J (R. 40A), Exhibit K (R. 40C), Exhibit L (R. 42A), Exhibit M (R. 42B), Exhibit N (R. 44A), Exhibit O (R. 44B) and Exhibit R (R. 48A), contained a clause reading as follows:

> "This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States" (See Point I-A, at p. 47 of this brief).

that that decision had been affirmed in *The Etna Maru*, 33 Fed. (2d) 232 (C. C. A. 5) on "another ground"; but the court does not state what it believed such other ground was, and an examination of those opinions and of the Record in that case shows that no such other ground exists (see p. 18 of this brief). The court also specifically declined to regard as controlling this court's statement in *The Malcolm Baxter, Jr.*, 277 U. S. 323, that a shipowner has not brought himself within Section 3 of the Limitation Act of 1851 if the only damages sued for or established by the evidence result from failure to use due diligence to make the vessel seaworthy.

The following, more extended statement of the facts, is based entirely on respondent's own uncontradicted evidence. In August, 1926, the respondent, through its New York agents, Ellerman's Wilson Line, New York, Inc., 26 Broadway, New York City, whose stock was entirely owned by the respondent (R. 343), held itself out at New York by advertising in the papers as a common carrier of goods on its steamship "Galileo" from the port of New York to the port of Hull, England (R. 335). It admittedly endeavored to "book all the cargo we can for her and we get it alongside the steamer" (R. 335). The bills of lading, as a matter of usual practice, were issued and signed by the Ellerman's Wilson Line, Ltd. by Ellerman's Wilson Line, Inc., the New York subsidiary, as agent (R. 336, 344, 343, 347).

On August 27, 1926, various persons, the petitioners here, shipped goods on board the "Galileo", then at the port of New York, and received therefor negotiable bills of lading (R. 30A to 48B inclusive). The bills of lading in

---

(Footnote continued from bottom of page 8.)

Two other bills of lading, Exhibit C (R. 32B) and Exhibit D (R. 34A), contained a clause reading as follows:

> "The shipment under this bill of lading is also subject to all the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States."

One other bill of lading, Exhibit P (R. 46A) contains a clause which merely incorporates the Harter Act.

the form Exhibit A annexed to the libel were signed by the respondent as follows:

> "Ellerman's Wilson Line, Limited, By Ellerman's Wilson Line, New York, Inc., as Agents" (R. 30A).

The remainder of the bills of lading were signed by persons admittedly duly authorized by the Ellerman's Wilson Line, Ltd. to sign such bills of lading (R. 23, 24, 51, 555). The managing officers of the respondent at Hull personally arranged by cable for the booking of the cargo and the terms to be agreed upon with the shippers (R. 350, 351 and 352). All of the bills of lading acknowledge receipt of the goods in apparent good order and condition, and promise that the goods will be transported by the good steamship "Galileo" and will be delivered in like good order and condition at the port of Hull (R. 30A to 48B).

Before the "Galileo" sailed from New York, a cable was received by the respondent's New York agent from the respondent itself at Hull, peremptorily directing that 850 tons of coal belonging to the respondent be also loaded on the "Galileo" as bunkers for use on another of respondent's vessels, the "Francisco", to which the coal would be transferred after arrival at Hull (R. 346). The cable read as follows (R. 572, 572A):

> "HULL 9 August 20, 1926
> LCO WILSONLYN NY
>
> 'GALILEO' LOAD EIGHTFIFTY BUNKERS TRANSFERENCE 'FRANCISCO'."

The respondent's New York agents employed stevedores, the Jarka Company of New York, to load the coal (R. 345). Magarelli was the foreman stevedore of the Jarka Company (R. 328), and he proceeded to the "Galileo" with a gang of coal trimmers (R. 329). When the trimmers went into the bunkers on the "Galileo", they discovered that the old bunker coal left over from the previous voyage was so very

hot that it burned their boots and made one of the trimmers so sick that he "fell out" (R. 329). The heat and gas in the bunkers were so bad that none of the trimmers could work for more than 10 or 15 minutes at a time (R. 330). The trimmers protested to Magarelli that "they can't work no more" and "started to kick and holler, it was too warm down there", "The coal, it is too warm" (R. 329). Magarelli, while on the coal boat alongside the "Galileo", could "smell the gas over the side, there was gas come on the coal boat" (R. 331). Magarelli, after receiving the protest, went down in the hatch himself and found that the coal was too warm, and that the men could stay there only ten or fifteen minutes to work (R. 330). Thereupon, Magarelli immediately protested to a man named Oxtoby, the Chief Engineer of the "Galileo", who was on board the "Galileo" and said: "The coal is very hot" (R. 330)—the coal that is already in the bunkers (R. 331). "Chief, my men be kicking there down below, it is warm, and they can't stay down below" (R. 330). But the Chief Engineer paid no attention to Magarelli's protest (R. 330), and the trimmers "went on loading the coal" (R. 331).

Oxtoby, the Chief Engineer of the "Galileo", testified that before the "Galileo" sailed from New York, Magarelli, "the foreman, came to me" (R. 307)—"The foreman of the coal trimmers, and he said that the coal was hot" (R. 307), and "He said it was burning the men's boots" (R. 307). Oxtoby ignored the protest (R. 316), and "brushed him aside and told him to go about his business" (R. 316).

Within six hours after the "Galileo" sailed from New York (R. 59), bound for Hull, the heating reached the ignition point, and fire broke out in the coal in the compartment where Magarelli's men had been working (R. 59). The fire was so serious that after a consultation of officers, and without waiting for a reply to an urgent wireless message from the Master to the agents of the "Galileo", Ellerman's Wilson Line, Inc., at New York, informing the

Line of the fire and suggesting return to port and discharging or shifting of coal, it was decided to proceed back to New York, where assistance could be obtained to shift the coal to get at the seat of the fire (R. 62). To get at the seat of the fire required shifting of 250 to 300 tons of coal (R. 62).* After reaching New York, and while water was being pumped in in an effort to extinguish the fire, the "Galileo" capsized, causing her and her cargo to become a total loss (R. 63).

Without questioning the facts in any way, we think it significant to observe the manner in which they were presented. The shipowner first pleaded that the ship was seaworthy. When it became clear that this burden could not be sustained, the chief engineer of the vessel, a "sea servant", was brought in and assumed full responsibility, although that involved an admission by him that his previous statement was false (R. 326). By this means the shipowner, while conceding that it personally (through its regular corporate officers at Hull) ordered the loading of the coal and that it itself (through its New York managing agent) employed the shore servants or stevedores to do the actual loading, tried to bring the case within the so-called "sea servant" doctrine, and thus obtain an exoneration which it could not obtain unless it could pass the responsibility on to a sea servant. This shows that the implications of the "sea-servant" doctrine (if any such doctrine exists) should at least be narrowly construed by this Court; and that it should not be applied to a case in which the alleged negligent act of the sea servant did not occur at sea but occurred in the loading port while the vessel was still under the control

*This Court in *International Navigation Co.* v. *Farr*, 181 U. S. 218, held that a perilous condition on board a ship which could not be corrected after sailing, except by the expenditure of much time and labor in shifting cargo, rendered a ship unseaworthy, and quoted at 181 U. S. 223 and 224, a passage from the decision in *The Sylvia*, 171 U. S. 462, where this Court clearly points out what constitutes unseaworthiness in this connection. As the Circuit Court of Appeals has cited *The Sylvia*, 171 U. S. 462, at page 464, to sustain its finding of unseaworthiness, it is clear that the circumstances set forth above were those upon which the Court based its finding of the ultimate fact of unseaworthiness (R. 642).

of the shipowner's managing agent. Otherwise, a shipowner can always as a practical matter, in any serious case of damages, get a sea servant to come in, as here, and assume the responsibility as to any case of easily observable, but allegedly unknown and unsupervised, reckless carelessness or unseaworthiness in the loading port which makes the vessel unsafe to be ordered by the managing agent to sea.

Questions Presented to this Court.

The questions presented for decision are:

If damages result from failure to use reasonable care in the loading port to supply, prepare and inspect a vessel for sea, so far as protection against outbreak of fire is concerned, and if the unseaworthy condition of the vessel is discoverable by exercise of ordinary care before sailing, by even an unskilled person, is the Act of 1851 applicable as to such preventable loss, on the theory that the shipowner was not at fault or negligent in supplying, preparing and inspecting the vessel before it sent her to sea?

And is the Act of 1851 applicable if the additional fact appears that the shipowner held itself out as a common carrier under its corporate name, through its managing agent, in the loading port, and personally contracted and warranted, through its managing agent in that port, that the vessel on sailing would in fact be seaworthy so far as the exercise of ordinary care could make her so?

The Circuit Court of Appeals has decided the foregoing questions in the affirmative by holding that Congress intended by the Fire Statute to exempt the shipowner from liability on those facts, as concurrently found below.

Our contention is that, independently of contract, it is the personal duty of the shipowner to see to it that ordinary care is used in supplying, preparing and inspecting its vessel for sea, while she is still in the loading port,

where the cargo has been booked and shipped; and that certainly this is so where the shipowner personally has contracted and warranted that the vessel on sailing from the loading port will be seaworthy so far as use of ordinary care can make her so; and that such duty is non-delegable so far at least as an ordinary inspection by any unskilled person would have disclosed the unseaworthiness before the vessel sailed.

The unprecedented decision of the Circuit Court of Appeals in the present case is that the law places the statutory exception of "fire" on a more preferred basis than any of the other exceptions dealt with in the various Acts of Congress or in the maritime law, and that Congress by the fire statute intended not only to except loss from fire, but also loss from failure to take ordinary precautions while the vessel is still in the loading port under the control of the shipowner's managing agent to prevent outbreak of fire. No reason of equity or principle, however, is given by the Circuit Court of Appeals as to why they think that Congress intended to give the exception of fire this highly preferential *sui generis* status. The only reason given by the Circuit Court of Appeals is that the fire statute is mentioned in the contracts of affreightment (R. 647). "Assuming these contracts to have been personal, they expressly incorporated the exemption accorded by Section 4282" (C. C. A. Opinion, R. 647). But, inasmuch as the fire statute (Section 4282, R. S., re-enacted from Section 1 of the Limitation of Liability Act of March 3, 1851) is, as part of the law of the land, impliedly incorporated in every contract of affreightment, whether mentioned or not, and inasmuch as no question of waiver by contract is involved, no reason is given by the Circuit Court of Appeals (and, we submit, there is no valid reason) why the incorporation of that statute in a contract should give one of the contracting parties any greater rights than he would have if it were merely impliedly incorporated as part of the law

of the land. The plain fact, as concurrently found by both courts below, is that on sailing from the loading port the vessel in this case was not seaworthy so far as ordinary care could make her so, and that the fire was merely an inevitable and foreseeable result of that carelessness at the loading port. Damages flowing inevitably from such carelessness are not damages from "fire", so as to make the fire statute applicable.

The Circuit Court of Appeals went entirely outside the issues raised by the pleadings and announced the novel doctrine that the failure to supply a seaworthy vessel was not a failure of the shipowner but of the chief engineer of the vessel. But, so far as the shipowner and the shippers are concerned, the duty of supplying a seaworthy vessel is not that of the chief engineer. That duty rests on the shipowner personally both by maritime law since time immemorial, and independently by the very contracts of affreightment. The promise and warranty in every contract of affreightment that, at the time of sailing the vessel will be fit and safe to sail, is that of the owner and operator. That duty cannot be "delegated" to a chief engineer with whom the shipper has no relations whatever, either contractually or by maritime law. The Circuit Court of Appeals overlooked entirely the fact, pointed out by the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. 2nd 232, that the duty to make the vessel seaworthy, so far as the shipper is concerned, is that of the shipowner personally, so that neglect to perform it before sailing, while the vessel is still in the loading port under the shipowner's personal control, constitutes personal "neglect" as that term is used in the proviso of the Fire Statute.

Argument.

I. The fire exception in the Act of 1851 has no application to damages which result inevitably from failure (while a vessel is still in the loading port under the control of the owner's general agent), to use reasonable care to supply, prepare and inspect the vessel for sea so far as protection against outbreak of fire is concerned,—particularly when the unseaworthy condition of the vessel is discoverable by exercise of ordinary care before sailing by even an unskilled person.

The conclusion of the Circuit Court of Appeals that the respondent was not guilty of negligence was based on the assumption of law that the respondent was under no personal duty in the loading port to see to it that ordinary care was used in preparing its vessel for sea, or to inspect her before ordering her to sail (R. 589, 590, 646, 647). A further assumption of law was made that the mere incorporation of the Fire Statute by a separate clause in the bill of lading had the legal effect of relieving the shipowner from what would otherwise be the plain meaning of the warranty of seaworthiness in another clause in the bill of lading. Not only are these assumptions of law not justified but the concurrent finding that the fire was inevitable from the observable unseaworthiness required a conclusion of law that the proximate cause of loss was not the fire or the negligent act of the chief engineer, but the unseaworthiness. Consequently the conclusion or finding of the Circuit Court of Appeals was, as this Court held in *The Edwin I. Morrison*, 153 U. S. 199, 215-216, a finding "determined by the interpretation which the law put upon the circumstances of the transaction as stated in the previous findings, and, as such, open to our revision."

The Circuit Court of Appeals at the end of its opinion

in effect says that if the respondent was under a personal duty to see to it that due diligence was used to make its ship seaworthy, it performed that duty because it was under no duty to hire a shore superintendent and because it was under no duty to require an inspection to be made by a Mr. Huff (R. 646, 647), who was a cargo surveyor not in the employ of the shipowner and who had nothing to do with the coal, or with the 'tween deck compartment where the fire occurred (R. 400, 402). We submit that this ground of decision is illogical, being a pure *non sequitur* and wholly ignores the nature of the duty of the shipowner, a common carrier, particularly when he has contracted specially as "owner" to exercise "due diligence to make the steamer seaworthy" (R. 30A).

In *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at page 150, this Court said:

> "This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer *becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners;* and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage." (Italics ours.)

Both the Circuit Court of Appeals and the District Court overlook, and give no significance whatever in their final conclusion, to the important fact, as shown from the concurrent finding, that the fire was inevitable as a result of the unseaworthiness (R. 587, 642), and the admission in the answer that the losses sustained by the petitioners were all caused by the fire (R. 52). It is quite immaterial, there-

fore, whether the neglect which caused the unseaworthiness was the neglect of the owner in the five particulars mentioned by the Circuit Court of Appeals, or was the negligence of its employee, the chief engineer. Here there is an express warranty of seaworthiness which has been breached, and here also the unseaworthy condition was observable before sailing by even an unskilled person. It was this very point which the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. 2nd 232, decided the other way. In that case the Court held (33 Fed. 2nd at p. 234):

> "It is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against the ship. *Richardson* v. *Harmon,* 222 U. S. 96; *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334; *The Malcolm Baxter, Jr.,* 277 U. S. 323."

The decision now in review is squarely in conflict with that case. The Circuit Court of Appeals here when it stated that the decision of the District Court in *The Etna Maru,* 20 Fed. (2d) 143 was affirmed on another ground, was clearly in error. The able opinion by Judge Hutcheson in the District Court reviews all of the cases and is an excellent statement of the law. A comparison between that opinion and the opinion of the Circuit Court of Appeals for the Fifth Circuit does not disclose any difference of views between the two courts. The District Court dealt with the case as if the right of the owner to limitation of liability under section 3 of the Act of 1851, as well as to exoneration from liability for fire damage under section 1 of that Act, was involved; whereas the Circuit Court of Appeals found it unnecessary to decide the question whether the owner of the "Etna Maru" was entitled to limit its liability, because the value of the vessel was sufficient to pay all claims. We submit that the Circuit Court of Appeals in the present case was under a clear misapprehen-

sion in assuming that the affirmance by the Circuit Court of Appeals for the Fifth Circuit as to section 1, without passing on the question of limitation under section 3, constituted an affirmance "on another ground". The fact that the suit was *in rem* so that the liability of the ship rather than that of the owner was nominally being litigated, is unimportant. In *Liverpool Navigation Co.* v. *Brooklyn Terminal,* 251 U. S. 48, at pages 52 and 53, this Court held that in determining the applicability of the Limitation Act (of which the so-called Fire Statute is merely one section), it is immaterial whether the suit is *in personam* or *in rem.* Consequently, when the Circuit Court of Appeals for the Fifth Circuit decided in *The Etna Maru* that the ship was liable, it, under well-settled law, held that the shipowner was not exonerated from liability by the Fire Statute. It is plain that in so holding it was following this Court's decision in *The Malcolm Baxter, Jr.,* 277 U. S. 323, and also the other decisions it cites, that as to damages flowing from unseaworthiness, it makes no difference whether the negligence which causes the unseaworthiness is that of the owner himself or of his employee. The failure to correct unseaworthiness which existed before sailing and which ordinary care by any unskilled person would have discovered, is always want of due diligence on the part of the owner.

The District Court in the present case found (R. 589) that the dangerous and unseaworthy condition was discoverable by the use of due diligence "about the time of the departure". The District Court said: "Once the new supply had been loaded, no inspection of the temporary bunker would have disclosed the danger *until about the time of the departure*" (R. 589). (Italics ours.) In view of the well-settled law as repeatedly stated by this Court, that the warranty of seaworthiness applies at the time of departure from the loading port, this finding by the District Court necessarily called for a decision that the respondent was per-

sonally negligent in failing to supply a vessel which was seaworthy at the time of departure from the loading port so far as use of ordinary care could make her so, and that the respondent had not used such care. The ultimate conclusion of law of the District Court was, therefore, the opposite of what the facts found by it required. The District Court was evidently unaware, we respectfully submit, of the rule of law that the warranty of seaworthiness attaches at the time of departure. *The Caledonia,* 157 U. S. 124, at page 130; *The Sylvia,* 171 U. S. 462; *International Navigation Co.* v. *Farr,* 181 U. S. 218; *McFadden* v. *Blue Star Line,* 10 Asp. N. S. 55, 58; *Sumner* v. *Caswell,* 20 Fed. 249, 252; *In re Meyer,* 74 Fed. 881, 885; *The Eugene Vesta,* 28 Fed. 752; *Bowring* v. *Thebaud,* 56 Fed. 520 (C. C. A.); *The Newport,* 7 Fed. (2d) 452, 454 (C. C. A. 9); *Kaufer Co.* v. *Luckenbach Co.,* 294 Fed. 978. (See also Carver on Carriage of Goods by Sea, 7th Edition, page 30.) This is further apparent in view of the uncontradicted evidence that the dangerous and unseaworthy condition was obvious during the entire period of loading.

We submit that this conflict between the Circuit Court of Appeals of the Second and Fifth Circuits has already been resolved by the decision of this Court in *The Malcolm Baxter, Jr.,* 277 U. S. 323, 331, where this Court held that a shipowner is responsible for all the damages flowing from unseaworthiness, and is not entitled to the "exoneration and limitation of liability" permitted by R. S. Sections 4282-4289 (the Limitation Act of 1851) if he has failed to use due diligence to make his ship seaworthy. In that case this Court said:

> "Both courts below agreed that the 'Baxter' was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of

liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and Acts permitting limitation of liability to the vessel and pending freight. R. S. Sections 4282-4289." (*The Malcolm Baxter, Jr.*, 277 U. S. 323, 331.)

And in the same case:

"But for all damages legally attributable to the breach of warranty of seaworthiness, petitioners may recover." (*The Malcolm Baxter, Jr.*, 277 U. S. at p. 333.)

But in the present case, the Circuit Court of Appeals virtually declines (R. 644-645) to follow *The Malcolm Baxter, Jr.*, and implies (R. 644-645) that the use of the language we have just quoted was an inadvertence on the part of this Court. The Circuit Court of Appeals said (R. 644-645):

"The libellants argue that whatever the British law may be, our decision must be rendered in their favor because of *The Malcolm Baxter, Jr.*, 277 U. S. 323. While the fire statute was not involved in that litigation, limitation of liability under section 4283 was, and the libellants seize upon the following language at page 331:

'Both courts below agreed that the "Baxter" was unseaworthy on sailing and that the respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and acts permitting limitation of liability to the vessel and pending freight. R. S. secs. 4282-4289. * * *'"

* * * * * * * *

"We feel confident that the Supreme Court did

not intend by this brief reference to the limitation statute to modify the long established construction of the phrase 'without the privity or knowledge of the owner'."

* * * * * * * *

"In the case of 'The Malcolm Baxter, Jr.', as appears from the decision of the district court (not officially reported), the vessel's hull had defects which an inspection would have disclosed but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity'. So understood the case is quite in line with earlier authorities."

The reference of the Circuit Court of Appeals to an absence of a warranty of seaworthiness in the bill of sale in the *Baxter* case, is wholly irrelevant, because the suit in *The Malcolm Baxter, Jr.* was on a contract of affreightment, and not on a bill of sale. This Court decided in that case that the shipowner was not entitled to the protection of the limitation acts because of its breach of the warranty in the contract of affreightment as to seaworthiness, together with the evidence that the unseaworthiness was discoverable and preventable before sailing by use of due diligence. No warranty in the bill of sale could, of course, have greater evidential effect in a suit for breach of a contract of affreightment than a certificate of seaworthiness. Indeed, it would not be of as much probative value as a certificate of seaworthiness, because the warranty in the bill of sale is that of an owner, who is not necessarily a skilled person, whereas, a certificate of seaworthiness is a statement of a skilled person. But it is settled by a long line of authorities that even certificates of seaworthiness are not proof of due diligence. See *Bank Line* v. *Porter,* 25 Fed. (2d) 843 (C. C. A. 4), where the authorities are collected.

The Circuit Court of Appeals further mistakenly assumed that in the *Malcolm Baxter, Jr.* case there was no survey of the vessel before she sailed from New Orleans (R. 645). But that there was such survey appears from the opinion of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. at page 332, and from numerous places in the record in that case. This Court said:

> "Respondents had purchased the vessel about one month before she sailed. At that time she was unseaworthy, due to a 'hog' or camber in her keel, a structural weakness dangerous to the ship in heavy weather, which later caused the leak and made necessary the repairs at Havana. Following the purchase and before sailing from New Orleans a survey was made by the owner, which appears not to have disclosed her condition, but both courts below agree that the fact of her unseaworthiness could have been discovered by due diligence."

It is abundantly clear from the foregoing quotation that this Court in the *Baxter* case fully understood that there had been a survey before the vessel sailed from New Orleans, and that in stating its ground of decision as quoted by the Circuit Court of Appeals (R. 644-646), this Court had that fact in mind.

The Court below also overlooked the fact that in the opinion of the District Court in the *Baxter* case, the Court found that a surveyor of the New Orleans Board of Underwriters granted a certificate of loading and that a surveyor named Thompson also looked over the vessel. The District Court found that Thompson's survey was not as careful as it should have been. It said: "The chances are good that the defects would have been found at New Orleans had anyone cared enough to look for them." (See the record in the *Malcolm Baxter, Jr.* case, on file in this court, October Term, 1927, No. 459, Volume I of the

Transcript of Record, at pp. 241-243.) The fact is that there was considerable diligence exercised by the owner in the *Malcolm Baxter, Jr.* case, but here no diligence whatever was exercised by the respondent, or by the "Galileo's" officers, to protect the vessel from outbreak of fire. The plain and inescapable fact is that in the *Malcolm Baxter, Jr.* case, the owner was held liable because its surveyor did not make as careful an examination as he should.

Furthermore what was said by this Court in *The Malcolm Baxter, Jr.*, was no inadvertence, as is suggested by the Court below in its opinion (R. 644-646), because this Court in *The Malcolm Baxter, Jr., supra,* merely applied the rule laid down by it in *Richardson* v. *Harmon,* 222 U. S. 96; *Pendleton* v. *Benner Line,* 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139, and in *Capitol S. S. Co.* v. *Cambria Steel Co.,* 249 U. S. 334.

The decision in *The Malcolm Baxter, Jr., supra,* was also no inadvertence because of still another line of decisions of this Court. The leading cases are *The Caledonia,* 157 U. S. 124, *The Edwin I. Morrison,* 153 U. S. 199; and *The Carib Prince,* 170 U. S. 655.

In *The Caledonia,* 157 U. S. 124, at page 130, this Court said:

> "In *The Edwin I. Morrison,* 153 U. S. 199, 210, the language of Mr. Justice Gray, delivering the opinion of the Circuit Court in the present case, was quoted with approval, to this effect:
>
> 'In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact sea-

worthy at that time, and does not depend upon his knowledge or ignorance, his care or negligence.'

After renewed consideration of the subject, in the light of the able arguments presented at the bar, we see no reason to doubt the correctness of the rule thus enunciated.

The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage, we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view.

In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

Again in *The Caledonia* (157 U. S. at p. 137), this Court said:

"As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, *and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel.*" (Italics ours.)

So also the Fire Statute does not relieve the owner from loss by fire caused by unseaworthiness which is discoverable by use of ordinary care before sailing, and does not reduce its duty to make the ship seaworthy in respect of fire.

Here the shipowner did nothing itself to make the ship seaworthy so far as protection from fire was concerned, notwithstanding the fact that the contractual provision is "the owners have exercised due diligence to make the steamer seaworthy" (R. 30A), and not that some subordinate of the shipowner would exercise due diligence to make the ship seaworthy. But assuming, for purposes of argument, the propriety of any delegation by the shipowner of this personal duty undertaken by it for a consideration, the freight money, it must necessarily, in order to avoid a personal breach of that warranty, at least see to it, by inspection of the vessel or otherwise, before sailing, that the person to whom it has delegated the performance of the duty has in fact performed it. *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174. The unseaworthiness was not only known to the Chief Engineer, but it was also of so obvious a nature that unskilled laborers, the coal trimmers, complained of it. The fact that the unseaworthiness was not observed by its shore representatives is unimportant, because at all times while the vessel was in the loading port the owner had reasonable means of obtaining knowledge; and it failed to instruct its shore representatives at the loading port, New York, to inspect the ship, apparently under the assumption that by permitting itself and its shore servants to remain in ignorance of the condition of the ship, it would become entitled to the privileges granted by the Act of 1851.

This ingenious device to avoid the personal obligation to supply a ship which, at the time she is sent to sea from the loading port, is seaworthy so far as ordinary care can make her so, is not only opposed to the contract provision in this case and to the doctrine repeatedly reiterated by this Court, but, if approved here, would discharge the shipowner from all obligation to owners of cargo when the loss of cargo has been caused by failure of the shipowner to exercise any supervision over dangerous conditions which

would have been discoverable if any one interested enough on the shipowner's behalf had cared to look for them before sailing. If the seal of approval of this Court is put on this device, the shipowner has every inducement to stay away from his ship while she is in the loading port and also to keep his shore agents and representatives from going on board, for fear they might discover some condition which would cause the shipowner some liability or expense to remedy. Any such doctrine, obviously, directly tends to increase the danger while at sea to all persons and goods on ships leaving United States ports. It is a direct repudiation of the decision of this Court in *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, where this Court unequivocally stated that it made no difference in so far as due diligence to make the steamer seaworthy is concerned whether or not the failure to exert due diligence was that of the shore servants or that of the sea servants, if it occurred before sailing.

See also *The Wildcroft*, 201 U. S. 378, where this Court was discussing a condition which "a proper inspection of the vessel at the beginning of the voyage would have discovered and remedied" (p. 387). This Court reaffirmed what it had said in *International Navigation Co.* v. *Farr*, and said (in *The Wildcroft*, 201 U. S. at pp. 388, 389):

> "He (the shipowner) is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give for lack of opportunity, will establish whether this duty has been complied with. The whole matter is within the control of the owner."

In *The Edwin I. Morrison*, 153 U. S. 199, at page 215, this Court said:

> "*The obligation rested on the owners* to make

such inspection as would ascertain that the caps and plates were secure." (Italics ours.)

The duty of inspection, whether imposed by Statute or by the Maritime Law or, as here, also expressly undertaken by contract, is wholly "within the control of the owner" (201 U. S. at p. 389). It was, therefore, incumbent upon the shipowner here to show that a due and proper inspection had been had and the vessel ascertained to be in all respects seaworthy and fit to carry the cargo which she had undertaken to transport, or that due diligence to that end had been used (*The Wildcroft,* 201 U. S. at p. 387).

When, as here, the petitioners' loss legally flows from the unseaworthiness—*The Malcolm Baxter, Jr., supra*—the proximate cause of the loss is the unseaworthiness, and not fire. See *The G. R. Booth,* 171 U. S. 450, at page 460, where this Court discusses the question at great length. In that case this Court said:

> "In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgment of this court, above referred to."

And again:

> "The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but on the contrary, it was an in-

cident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion—events so linked together as to form one continuous whole."

The intervening fire on the "Galileo" was a mere incident, and an inevitable consequence, of the failure of "the owners" (R. 30A) to exercise "due diligence to make the steamer seaworthy".*

This is not a case in which the shipowner is excused by the contract or by a statute from liability for breach of the warranty of seaworthiness, that warranty in this case being that the vessel on sailing from the loading port would in fact be seaworthy so far as ordinary care could make her so. Congress surely did not intend any such result by the language used by it in the Fire Statute. Indeed, the language of the statute is not susceptible of an interpretation which would permit sending an unseaworthy ship to sea when ordinary care has not been exercised to make her seaworthy. It is therefore immaterial what the antecedent conditions were, whether or not due to negligence,

---

*The writer of the opinion of the Circuit Court of Appeals inadvertently used the word "proximate" instead of "immediate" in stating that the petitioners conceded that the proximate cause of the loss was the fire. The statement is absolutely without support in the record, unless "proximate cause" is there used as meaning "immediate cause". The stipulation entered into on November 1, 1929, before respondent disclosed, on November 11, 1929, facts exclusively within its knowledge as to the obviousness of the unseaworthiness of the "Galileo" before sailing, was as follows (R. 556):

> "3. All of the merchandise shipped on the S. S. 'Galileo' on the voyage mentioned in the libels sustained some damage from fire occurring on board said steamer and/or water resulting from an effort to put out the fire."

Nothing whatsoever was said in the stipulation as to proximate cause, which was the issue litigated at the trial. The cargo damage, of course, followed the fire, but the fire was only the immediate cause, as was found concurrently below, because both courts found that the fire was inevitable on sailing. Moreover, this finding was based exclusively on evidence introduced by the shipowner in its defense long after the stipulation was entered into. Consequently, as the fire was inevitable at the time the ship sailed, and as the Circuit Court of Appeals itself found that this inevitableness of fire rendered the ship unseaworthy, it is clear that the proximate cause of the loss was the unseaworthiness and not the fire. The stipulation does not, nor was it ever intended to, alter this situation.

which resulted in the vessel becoming unseaworthy, because under the contract, and under maritime law, it was the inescapable duty of the shipowner to see to it that his vessel was seaworthy on sailing so far as ordinary care could make her seaworthy. The ingenious, but unsound, theory of respondent's counsel, which the Circuit Court of Appeals adopted, is that if one of the antecedent conditions of the unseaworthiness is negligence of a subordinate, then the shipowner is excused by the Fire Statute. And this notwithstanding "the owners" (R. 30A) promised in the written contract of affreightment that they themselves would exercise "due diligence to make the steamer seaworthy" (R. 30A). Under the concurrent findings of the Courts below and the peculiar doctrine announced by them, the anomalous result follows: If the shipowner, in answer to a *prima facie* case against him for non-delivery, himself introduces evidence, as here, establishing that his vessel on sailing from the loading port was unseaworthy and that the loss resulted inevitably from such unseaworthiness, he has thereby shown a breach by himself of the contract of affreightment, and the mere invoking of the Fire Statute or its incorporation in the contract is of no protection to him. However, if he continues introducing further evidence and offers testimony that one of his vessel's officers was negligent in the loading port in preparing the vessel for sea, and that this caused the unseaworthiness, then he is exonerated from liability because of the Fire Statute. In other words, it is only by ignoring entirely the concurrent finding of unseaworthiness and the inevitability of petitioners' damages from the unseaworthiness that the theory adopted by the Circuit Court of Appeals can be said to be rational. But the fact of unseaworthiness cannot, we submit, be ignored. The duty to make the ship seaworthy is the primary and most important duty of a shipowner in every contract of affreightment. *The Caledonia,* 157 U. S. 124. In so far as damages result inevitably from unseaworthiness,

negligence of a subordinate, and the effect of the Fire Statute, are immaterial. Failure to see to it that ordinary care is used to make the vessel seaworthy on sailing from the loading port is always negligence of the shipowner himself. Especially is this true when the shipowner himself has warranted that at the time of sailing from the loading port the vessel is in fact seaworthy so far as due diligence can make her so, and that he, himself, had exercised that diligence.

Judge Learned Hand has demonstrated that such a breach of warranty, in *The Soerstad,* 257 Fed. 130, legally constitutes personal neglect and privity. He says:

> "A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary. And so the action on warranty was originally a pure action of tort (Ames, History of Assumpsit, 2 Harv. L. R. 1, 8), and arose a century before action on the case for assumpsit. The action sounded indeed in deceit (Y. B., 11 Ed. IV, 6 plac. 11), and it was not till 1778, in *Stuart* v. *Wilkins,* 3 Doug. 118, that assumpsit appears to have been used on a seller's warranty.

Regarded in this way, which is probably the correct way historically, *it follows inevitably that a breach of warranty should be held to be with the warrantor's privity,* because all the elements of the cause of action are 'done, occasioned, or incurred' by him personally; that is to say, he personally gives the false assurance, he intends the warrantee to rely upon it, and the loss arises from the mistaken reliance, as he knows it will. *Thus he personally occasions the loss.*" (Italics ours.)

In *Royal Exchange* v. *Kingsley Navigation Co.* (1923), Appeal Cases 235, at page 244, the Privy Council said:

"Mr. Mather, in his cross examination, was unable to make any alternative suggestion of the origin of the fire, except that of the heat generated by the contact of lime and water. He added, with perfect candour, 'Well, frankly, I will tell you that nothing has occurred to me, or anybody that I have spoken to, except the combination of lime and water.' *Their Lordships cannot doubt that the unseaworthiness of the 'Queen City' was the natural and direct cause of leakage,* sufficient to bring water into contact with the lime cargo, *and that the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that the loss is a loss naturally and directly attributable to the unseaworthiness of the ship,* and is not a loss arising from fire within the protection of s. 7 (of the Canadian Water Carriage of Goods Act). *The train of causation, from the unseaworthiness of the 'Queen City' to the outbreak of the fire, is unbroken,* and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), A. C. 350, 369, the proximate cause of a loss is not necessarily the cause nearest in time.

The question of onus is not material in these circumstances; but if a shipowner seeks to escape lia-

bility, on the ground that the loss did arise from fire, the onus of showing that the loss did arise from fire is affirmatively upon him." (Italics ours.)

The Circuit Court of Appeals assumed that this decision of the Privy Council went off on a difference in language between the Canadian Water Carriage of Goods Act and our Limitation Act. The passage here quoted from the judgment of the Privy Council, shows, however, that such was not the case.

Moreover, "the question of onus" is, as the Privy Council points out, most material if the question discussed is whether or not the owner is entitled to the benefits of the Fire Statute. Hence, when the Privy Council says that the question is not material in respect of a loss caused by unseaworthiness, it is clear that in the opinion of the Privy Council the Fire Statute has nothing to do with a loss so caused, even though a fire be a link in the chain of causation. See also: *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1915), A. C. 705, and the decision of the Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter,* 25 Fed. (2d) 843; certiorari denied, 278 U. S. 623.

In *Paterson, Zochonis & Co.* v. *Elder Dempster & Co.,* L. R. 1924 Appeal Cases 522, at page 548 (House of Lords), Lord Sumner, delivering his judgment, said:

> "The contract of carriage excepts liability for damage by improper stowage; but, if there was a breach of the implied warranty of seaworthiness, which *there is nothing in the contract to limit or oust,* none of the exceptions or limitations contained in the bill of lading avail to prevent the cargo-owner from recovering.
>
> Two things must, therefore, be shown: (1) that the ship was unseaworthy in the sense of the word established by the decisions, and (2) that the dam-

age complained of was caused thereby and would not have arisen but for that unseaworthiness." (Italics ours.)

The rule there stated by Lord Sumner is the rule applicable here. In view of the concurrent finding of fact by the Courts below that the "Galileo" was unseaworthy, and that the fire resulted inevitably from the unseaworthiness, and the admission in respondent's answer (R. 52) that all the damages sued for resulted from that fire, the fire and limitation statutes and exceptions should be held inapplicable and the respondent be held liable for the damages flowing from the unseaworthiness.

In *Chesapeake Lighterage Co.* v. *Baltimore Co.*, 40 Fed. (2d) 394 (C. C. A., 4), the master negligently permitted the charterers to load a large quantity of copper bars on his vessel, which was not in seaworthy condition to receive them, with the result that she soon sank. The shipowner introduced evidence that he had no knowledge of the unseaworthiness or the negligent loading, and therefore asked for limitation of liability. The Circuit Court of Appeals for the Fourth Circuit, in meeting this contention, said (40 Fed. 2nd 394, at page 395):

> "For authorities on the law that controls the question as to the privity or knowledge of the owner, reference to *The Virginia* (D. C.) 264 F. 986; *Sorenson et al.* v. *Boston Insurance Co. of Boston, Mass.*, 20 F. (2d) 640, and *Bank Line* v. *Porter* (*The Poleric*), 25 F. (2d) 843, will show the rule as laid down by this court. Under these decisions the judge below rightly held that the superintendent of the appellant company could, by proper inspection, have discovered the unseaworthiness of the barge, and that the appellant was therefore chargeable with knowledge of such unseaworthiness.
>
> The decree of the court below is accordingly affirmed."

In *United States* v. *Charbonnier* (*The Pinellas*), 45 Fed. (2d) 174, at page 177, the Circuit Court of Appeals for the Fourth Circuit, said:

> "The owners contend that even if the ship was unseaworthy, the evidence does not show that they were personally negligent in this respect, because the ship was built by an experienced and competent builder and was passed by official surveyors of the American Bureau of Shipping as being seaworthy in all respects; and it is pointed out that in such well-known cases as *Walker* v. *Transportation Co.*, 3 Wall. 150, 153, 18 L. Ed. 172, and *The Strathdon* (D. C.), 89 F. 374, it was held that the neglect which deprives the shipowner of the protection of the Fire Statute is his personal neglect and not merely the neglect of his officers or agents in charge of the ship. But in each of these cases, there was no showing that the ship was unseaworthy at the beginning. The negligent conduct complained of took place during the course of the voyage."

Again in *United States* v. *Charbonnier* (45 Fed. 2nd, at p. 177), the Circuit Court of Appeals for the Fourth Circuit said:

> "It is said that the implied warranty of seaworthiness applies to every contract of affreightment and imposes upon the owner the duty of furnishing a seaworthy ship which may not be delegated by him to anyone else. See *The Etna Maru* (C. C. A.), 33 Fed. 2nd 232.
>
> We are not disposed to criticize the rule laid down in this case, but it is not necessary to go to this length in order to find ample ground upon which to sustain the decision of the District Court."

In *The Poleric* (*Porter* v. *Bank Line, Ltd.*), 25 Fed. (2d) 843, certiorari denied 278 U. S. 623, the Circuit Court of Appeals for the Fourth Circuit found that the fire in that

case was due to the unseaworthiness of the vessel at the beginning of her voyage from Calcutta to New York, and said:

> "It is contended on behalf of the respondent that it is exempted from liability by the fire statute. This statute is set out in full in *The Poleric, supra.* On this point we agree with the learned judge below, when he says: 'In view, however, of the decision which I have reached on the subject of the seaworthiness of the "Poleric" at the commencement of the voyage, what is said above may after all be wholly academic since, if the ship was not seaworthy, and this fact was due to the personal negligence of the owner, and the failure in that respect was the cause of the loss, that of itself would make the statute inoperative. *The Virginia* (D. C.), 264 F. 986; *Hines* v. *Butler* (C. C. A.), 278 F. 877; *The Elizabeth Dantzler* (D. C.), 263 F. 596; *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1914), 1 K. B. 419-424 (1915) A. C. 705.'"

All of these cases accept the principle that a failure to exercise due diligence in the loading port to make the ship seaworthy, constitutes negligence of the owner and for that reason the fire statute does not apply.

In *Christopher* v. *Grueby* (*The Commonwealth*), 40 Fed. (2d) 8 (C. C. A. 1), the shipowner was held liable for personal injuries sustained by seamen resulting from a fire caused by the negligence of the engineer of the vessel in spilling gasoline while pouring it from a can into the reservoir of the lighting plant, thus permitting it to become ignited. The lighting plant on the vessel was not supplied with pipes for gasoline. Consequently, the reservoir had to be filled by pouring the gasoline from a can. The shipowner claimed the protection of the limitation statute, denied personal knowledge, and alleged the matter was a technical one for experts and not for an unskilled shipowner. The Circuit Court of Appeals for the First

Circuit held that the shipowner must be presumed as a matter of law to have personal knowledge or means of knowledge of dangerous fire hazards existing on his own vessel before sailing, and of the fact that gasoline was likely to be spilled, saying:

> *"It did not require the knowledge of an expert to appreciate this. The average man who gave the situation any consideration would understand and appreciate it.* * * * It is true that the 'owners' duty did not require them to provide a vessel of fire-proof construction, or to adopt the latest appliances, or the best safety devices'; but it did require them to provide reasonably safe appliances and equipment that would render those appliances reasonably safe for the use to which they were to be put in the place where installed and the condition there existing." (Italics ours.)
>
> * * * * * * * * *
>
> "Was the fire caused by the negligence of the owners or any of them in failing to provide and equip a seaworthy vessel?
>
> The duty of ship owners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, *responsibility for which they cannot escape by delegating its performance to another.* In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work." (Italics are the Court's.)
>
> * * * * * * * * *
>
> "The District Court found that the fire was due to the negligence of the engineer and not from any defective condition of the machinery or equipment on board the vessel. *But it does not follow that because the engineer may have been negligent that the owners are free from fault."* (Italics ours.)

This is in accord with the decision of this Court in *Pacific Co.* v. *Peterson,* 278 U. S. 130, at page 138, that

"unseaworthiness as is well understood, embraces certain species of negligence".

The Circuit Court of Appeals for the Ninth Circuit, in *Bethlehem Co.* v. *Gutradt Co.*, 10 Fed. (2d) 769, held that the duty to make a ship seaworthy was non-delegable. As this duty is non-delegable any breach of it is a personal fault of the person upon whom the duty lies.

In *The Annie Faxon*, 75 Fed. 312 (C. C. A. 9), the Court said:

> "We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, *unless the defects were apparent, and of such a character as to be detected by the inspection of an unskilled person.* * * *
>
> "When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded *of the inspector of a boiler.* It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concern *injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert.*" (Italics ours.)

None of the foregoing authorities, with the exception of *Bank Line* v. *Porter*, 25 Fed. (2d) 843 (C. C. A. 4), and *Charbonnier* v. *United States*, 45 Fed. (2d) 166, are mentioned by the Circuit Court of Appeals in the present case;

and these two cases are dismissed without reference to the principles therein discussed.

The Circuit Court of Appeals in the present case places its reliance upon two distinct propositions and citations of cases. The first proposition relied upon by the Circuit Court of Appeals is "That negligence of the ship's officers in causing a fire is not to be imputed to the owner so as to deprive him of the statutory immunity" (R. 643); in support of which the Court cites: *Walker* v. *Transportation Company*, 3 Wall. 150; *Craig* v. *Continental Insurance Co.*, 141 U. S. 638; *Keene* v. *The Whistler*, Fed. Cas. No. 7645 (D. Cal.); and *The Strathdon*, 89 Fed. 374, E. D. N. Y. (same case), 94 Fed. 206, affirmed 101 Fed. 600 (C. C. A. 2). The Circuit Court of Appeals overlooked the legal proposition that the damages here sued for flowed from unseaworthiness. The plain distinction between those cases and this case, as pointed out by the Circuit Court of Appeals for the Fourth Circuit, in *Charbonnier* v. *United States*, 25 Fed. (2d) 174, at page 177, is that in the *Walker* case and *The Strathdon*, "there was no showing that the ship was unseaworthy at the beginning. The negligent conduct complained of took place during the course of the voyage". This distinction on the facts renders those cases entirely inapplicable here. *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, did not involve the Fire Statute at all. The other case mentioned by the Circuit Court of Appeals is an old District Court case in California, *Keene* v. *The Whistler*. What was said in that case is diametrically opposed to what was said a few years later in the Circuit Court of California in *Lord* v. *Goodall*, Fed. Cas. No. 8506 (see p. 43 of this Brief, where we quote the language of the Court). It therefore cannot now be considered law even in California.*

---

*The decision of Judge Hoffman in *Keene* v. *The Whistler*, Fed. Cas. No. 7645, on the question of the liability of part owners must also be considered as overruled since the decision of this Court in *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, 150.

The Circuit Court of Appeals for the Fourth Circuit (in *United States* v. *Charbonnier,* 45 Fed. 2nd 174, 177) was clearly right in its statement respecting *Walker* v. *Transportation Co.* (3 Wall. 150), for in the *Walker* case this Court did not even suggest that it was deciding any of the questions presented here. The facts in that case were that the crew failed to attend fires in a vessel's boilers and left her unattended for the night. During the night the vessel and cargo were destroyed by fire before the vessel had sailed from her loading port and while she was away from her loading berth, tied up at the dock of Huff & Company. Such negligence was a failure to perform a mere routine duty in caring for the furnaces overnight and not a failure in respect of the seaworthiness of the vessel.

No breech of warranty was involved in the *Walker* case. No reference is made anywhere in the opinion to the shipowner's liability for a breach of the warranty of seaworthiness. Indeed, there could not be, because there was no warranty involved. It is well settled that the warranty of seaworthiness does not apply as of the time that the vessel is tied up and not taking cargo. See *McFadden* v. *Blue Star Line* (1905), 1 K. B. 697, at page 704, where it was said:

> "So, too, it is clear that the warranty of the ship being fit to encounter the perils of the voyage does not attach before she sails and while she is still loading her cargo. There is, of course, no warranty at the time the goods are put on board that the ship is then ready to start on her voyage; for while she is still loading there may be many things requiring to be done before she is ready to sail. The ordinary *warranty of seaworthiness,* thus, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed: *it takes effect at the time of sailing, and at the time of sailing alone.*" (Italics ours.)

In *Bowring* v. *Thebaud*, 56 Fed. 520, at page 523, it was held that there was also a warranty of portworthiness. The Court quoted with approval the following language from the opinion of Mr. Justice Field in *Cohn* v. *Davidson*, 2 Q. B. Div. 455:

> "Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires. A vessel seaworthy for port, and even for loading in port, may be, without breach of warranty, whilst in port, unseaworthy for the voyage (*Annen* v. *Woodman*, 3 Taunt. 299); but if she put to sea in that state the warranty is broken. Now, the degree of seaworthiness which the merchant requires is seaworthiness for the voyage; and surely the most natural period at which the warranty is to attach is that at which the perils are to be encountered which the ship is to be worthy to meet."

But the warranty of fitness to receive cargo is not a continuing warranty. See *Oneida Navigation Co.* v. *L. Richardson & Co.*, 282 Fed. 241, at page 243, where the Court quotes the following passage from Carver on Carriage of Goods by Sea, 6th Edition, page 27 [repeated in 7th Edition, Section 21, page 30]:

> "The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken in, if she became unfit before she started. The warranty, in truth, appears to be a double one, viz., that the ship shall be fit to receive the cargo when receiving it, and shall be fit to sail at the time of sailing. * * * Similarly the warranty of fitness to receive the cargo is not a continuing warranty after the goods are put on board; the warranty is that at the time the goods are put on board the ship is then

[fit] to receive them and encounter the ordinary perils during the loading stage."

It follows from these authorities that in the *Walker* case, *supra*, at the time the "Falcon" was tied up at the dock of Huff & Company, she was neither subject to the warranty of fitness to receive cargo (the cargo on board having already been received and the remainder of the cargo having nothing to do with that cargo) nor to the warranty respecting seaworthiness at the time of sailing, as that time had not come. It is clear, therefore, that the question of breach of warranty was not in the case. This Court naturally dealt with the case without reference to the question involved here, because in the absence of a warranty, there could be no breach. The only negligence was that of the ship's officers in caring for the ship in the matter of looking after her during the night time. Their neglect consisted in leaving the ship with no one to look after her fires. It was not in any sense a question of the unfitness of the ship or of the shipowner's coal or supplies on board which caused the fire.

The second proposition relied upon by the Circuit Court of Appeals is that the construction placed on the phrase "without the privity or knowledge of the owner" in former cases is inconsistent with the meaning of this Court's language in the passage which it quotes from *The Malcolm Baxter, Jr.*, 277 U. S. 323. In support of that proposition the court cites the following cases, which we now discuss in detail:

In *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, the first case cited by the Circuit Court of Appeals, there was no finding of fact that the vessel was unseaworthy at the time of sailing from the loading port, and the case did not purport in any way to deal with the question of unseaworthiness. Indeed, the negligent act in the case occurred long after the vessel had sailed from her loading

port. There was no negligence of anyone in that case which could possibly have resulted in causing the vessel to become unseaworthy at the time of sailing from her loading port. The only question involved in that case was whether underwriters, who had accepted an abandonment of an insured vessel, were entitled to the protection of the limitation statute.

The second case cited by the Circuit Court of Appeals is *La Bourgogne,* 210 U. S. 95. That case deals solely with negligence of the ship's officers, also occurring after the vessel had sailed from her loading port, and has nothing whatever to do with the question of unseaworthiness or damage flowing from unseaworthiness.

The third case cited by the Circuit Court of Appeals, *Lord* v. *Goodall S. S. Co.,* 4 Sawyer 292, Fed. Cas. No. 8506, did not involve the question of unseaworthiness. The facts there were that a ship, after leaving San Francisco, bound for San Diego, went ashore at Point Sur in a dense fog and was wrecked. After reviewing the history of the limitation statute and discussing *Walker* v. *Transportation Company,* 3 Wall. 150, the Court said (Fed. Cases 8506 at p. 887):

> "It is the duty of the owner, however, to provide a vessel with a competent master and a competent crew; and to see that the ship when she sails is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; *and if, by reason of any fault or neglect in these particulars, loss occurs, it is within his privity within the meaning of the act.*" (Italics ours.)

And again (Fed. Cases 8506 at p. 888):

> "Where a vessel is properly officered, manned and equipped, so as to render her seaworthy when she

leaves port, any loss resulting from causes *arising during the voyage after she leaves port,* without the privity or knowledge of the owner, will be within the protection of the statute." (Italics ours.)

What was said in the *Goodall* case is, therefore, precisely the opposite of the point for which it is cited by the Circuit Court of Appeals in the present case.

The fourth case cited by the Circuit Court of Appeals is *The Republic,* 61 Fed. 109 (C. C. A. 2). *The Republic* does not in any sense decide the proposition for which it is cited by the Circuit Court of Appeals. The court in *The Republic* did not have before it a case involving the negligence of a ship's officer, as the Circuit Court of Appeals in this case says. It held that the President of an owning company was negligent because "the loss arises from a defective condition of his ship of which he was ignorant, because of his own negligent examination of the vessel" (61 Fed. 112). In reaching that conclusion, the court stated that it did not feel it necessary to discuss the question dealt with in the decision of the District Court (reported as *In re Myers Navigation Co.,* 57 Fed. 240),—whether when a shipowner is guilty of a breach of a warranty of seaworthiness, it can claim the benefit of the limitation statute.

The fifth case cited by the Circuit Court of Appeals, *The 84-H,* 296 Fed. 427 (C. C. A. 2), did not deal with a contract of affreightment at all, but with a claim which had been made for the loss of life of a workman. No question of seaworthiness was involved in the case.

The sixth case cited by the Circuit Court of Appeals is *Arkell & Douglas* v. *United States,* 13 Fed. (2d) 555, at page 558 (C. C. A. 2). In that case the decision actually was that the shipowner was not entitled to limitation of liability because the managing agent of the company had

privity or knowledge of the dangerous condition. The case is further distinguishable on the ground that the vessel in that case was found as a fact to have been seaworthy in all respects at the time she sailed from her loading port, Port Arthur, and it was only because of an incident happening at an intermediate port, Galveston, that the danger and loss resulted. See 13 Fed. (2d) 555, at pages 555-556.

The seventh case cited by the Circuit Court of Appeals is *In re Spencer Kellogg & Sons*, 52 Fed. (2d) 129. This case did not involve a contract of affreightment or any question relative to a warranty of seaworthiness, and the shipowner in that case was in fact denied limitation of liability because its "works manager" had privity or knowledge of the negligence causing the loss. And the court further pointed out that it was immaterial that the works manager was not an officer of the company and that he disregarded his instructions from the officers of the shipowner. The court said (52 Fed. (2d) 131):

> "It is immaterial whether he disregarded his instructions. His fault charged his principal as though the limitation statute did not exist."

That decision denying limitation to the shipowner was affirmed by this Court in *Spencer Kellogg & Co., Inc.* v. *Hicks*, 285 U. S. 502.

The Circuit Court of Appeals clearly erred in holding in effect that Congress intended by the Fire Statute not only to relieve shipowners of loss by fire not caused by their neglect, but also to relieve them from the duty of taking ordinary precautions to prevent outbreak of fire. Under the decision of the Circuit Court of Appeals it is no longer the duty of shipowners to exercise reasonable control, supervision and inspection over vessels while they are still in the loading port and under their control to make them safe against outbreak of fire. That duty (al-

though specified in the contract as being that of *"the owners"*—R. 30A—of the vessel) is now (according to the Circuit Court of Appeals) the duty only of a chief engineer who has no relation of contract with the shippers. The court goes further and holds that the Fire Statute relieves the shipowner of this duty although the shipowner has contracted *as a common carrier* to exercise such control, supervision and inspection, and has personally booked the cargo and entered into the contracts of carriage in its own name at the loading port. The Circuit Court of Appeals reached this conclusion by holding as a matter of law that this duty of the shipowner could be abrogated or delegated entirely to an officer of the ship or "sea servant" (as defined by this Court in *International Navigation Co.* v. *Farr,* 181 U. S. 218), even before the ship sailed. Such an interpretation of the fire provision of the Act of 1851 necessarily applies to the other sections of that Act, and, if the interpretation is correct, shipowners will be encouraged to take no personal interest in making their ships safe to proceed to sea, and to abrogate all duties of management. We submit that the Circuit Court of Appeals, in ascertaining whether or not the respondent was negligent, has applied a rule of law which is altogether unsound. The error of the Circuit Court of Appeals was in holding that the duty of the respondent of seeing to it that its vessel was seaworthy so far as care could make her so was less than that of a common carrier. Such a theory was specifically condemned by this Court in *Bank of Kentucky* v. *Adams Express Company,* 93 U. S. 174, at page 180. In that case this Court held that the duty of a common carrier is "to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it"; that "the duty of a common carrier is to transport and deliver safely" (p. 180); that a bill of lading exception against loss by "fire" does not authorize the carrier to delegate to some one else his contractual duty of seeing to it that due care is in fact used to protect the goods from fire, because the com-

mon carrier has undertaken "for himself to perform an entire service"; and that "for these reasons we think it is not admissible to construe the exception in the defendants' bills of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed" (93 U. S. at p. 183). The ground of decision of the Circuit Court of Appeals also conflicts with the decision of this Court in *The Caledonia,* 157 U. S. 124. There this Court held that "the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel". When, as here, a shipowner fails in his contractual duty to supply a seaworthy ship, and loss results from such failure, the loss is not a loss from fire, and neglect with respect to the fire is immaterial. The only relevant fault is the failure of the owner himself to comply with his contractual duty to exercise due diligence to see to it that his vessel is seaworthy so far as reasonable care exercised by an ordinarily prudent man can make her so.

1-A. Neither the exception in the bill of lading of loss "by fire or flood, from any cause or wheresoever occurring", nor the insertion of a clause worded as follows, "This shipment is subject to all the terms and provisions of and all exemptions from liability contained in * * * Sections 4281 and 4287, each inclusive, of the United States Statutes" reduces or impairs the personal duty imposed by the warranty in a separate and distinct clause in the bill of lading that the responent would supply a vessel which on sailing from the loading port would be in fact seaworthy against fire so far as use of ordinary care in the loading port could make her so, and that "the owners" (R. 30A) of the vessel would themselves exercise the necessary due diligence to make the vessel seaworthy. The contract does not authorize the delegation of that duty.

The only modification in the bill of lading of the absolute warranty implied by maritime law that the vessel would in fact be seaworthy on sailing was as follows: "The carrier shall not be liable * * * for any loss * * * by * * * unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy" (R. 30-A).

(a) Nowhere in that entire clause dealing with seaworthiness and losses from unseaworthiness is there any mention (or incorporation by reference) of the Fire Statute or of any of the other sections of the Limitation Act of 1851, the clause dealing with "United States Statutes" being entirely separate and distinct.

(b) No mention is made in the bills of lading forms A, F, G and Q (covering most of the cargo) of Section 4282— the section of the Limitation Act of 1851 relating to fire;

(c) The clause is ambiguous and, therefore, must be construed against the shipowner who drafted it;

(d) Under the well settled rule of public policy in this country, neither the Fire Statute nor the Limitation Act has any application to a shipowner's personal contract; and

(e) Neither the Fire Statute, nor the Limitation Act, has any application to damages resulting solely and inevitably from failure or neglect in the loading port to supply and prepare a vessel properly for sea.

The Circuit Court of Appeals brushed this proposition aside by saying:

> "Assuming these contracts to have been personal they expressly incorporated the exemption accorded by Section 4282" (R., 647).

The Circuit Court of Appeals could only have meant

that the shipowner had modified its duty to furnish a seaworthy vessel by "expressly incorporating" in its bills of lading one of the clauses quoted in full in the footnote on pages 8 and 9 of this brief. A reference to the record (the citations are in the footnote at pp. 8 and 9 of this brief), shows, however, that the Circuit Court of Appeals was under a clear misapprehension as to the language in the bills of lading covering most of the cargo on the "Galileo" (R. 50A). Section 4282 (the Fire Statute) is not even mentioned in any of the forms—Exhibit A (R. 30A), Exhibit F (R. 36A), Exhibit G (R. 36C), Exhibit Q (R. 46C), which cover the vast majority of the cargo. (See list or statement of shipments under the various forms of bills of lading, R. 50A.) As to the remaining forms, covering a minority of the cargo, the clauses referring to the Fire Statute are quoted in full in the footnote on page 8 of this brief.

In bills of lading Exhibit A (R. 30A), Exhibit F (R. 36A), Exhibit G (R. 36C) and Exhibit Q (R. 46C), the language used is:

> "IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes."

There are no such statutes as "Sections 4281 and 4287, each inclusive, of the United States Statutes". If it be assumed in favor of the shipowner that the language means "Revised Statutes" the clause still does not refer to the Fire Statute. Section 4281 of the Revised Statutes of the United States, now United States Code, Title 46, Section 181, deals merely with the carrying of precious metals and other valuables and has nothing to do with fire; and Section 4287,

Revised Statutes of the United States, now United States Code, Title 46, Section 187, deals only with the reservation of a shipper's rights as against masters, officers or seamen. Neither of these sections has anything whatever to do with fire, nor with an owner's right to limit his liability. (See full text of these statutes, Appendix A of this brief.) If it should be contended that the court should supply the omission of the word "Revised" before the word "Statutes" contained in the clause, and supply the words "Sections 4282 and 4283" now omitted from the clause; or if it should be argued that this Court should substitute the word "to" for the word "and" now appearing in the clause between the figures "4281 and 4287", the complete answer is that this Court decided in *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, and in *The Caledonia,* 157 U. S. 124, that ambiguities in a bill of lading must be resolved strictly against the shipowner who drafted it.

The theory of the Circuit Court of Appeals that the mention of the Fire Statute in the bills of lading has any bearing whatever on the case conflicts with the decision of this Court in *The Caledonia,* 157 U. S. 124, that the "obligation to furnish a seaworthy ship should not be held to have been contracted away by implication" and with the decision in *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, at page 180, that the nature and extent of the fundamental duty of a common carrier to carry safely are "to be determined *by the nature of their business, not* by the *contract* they made respecting the liabilities which should attend it." (Italics ours.)

In *The Caledonia,* 157 U. S. 124, at page 137, this Court laid down the following rule:

> "There was no exception in this bill of lading which in express words exempted the shipowner from

furnishing a seaworthy vessel at the commencement of the voyage. As the exceptions were introduced by the shipowners themselves in their own favor, they are to be construed most strongly against them, and *we perceive no reason why the obligation to furnish a seaworthy vessel should be held to have been contracted away by implication.*" (Italics ours.)

The bill of lading clause quoted above cannot operate to contract away the shipowner's "obligation to furnish a seaworthy vessel" except by implication. It in no place suggests that intent, much less says so "in clear terms".

Later in *The Carib Prince,* 170 U. S. 655, this Court reaffirmed what it had said in *The Caledonia.* In that case the bill of lading contained an exception against latent defect, and it was argued that this exception operated to modify the warranty of seaworthiness. This Court held that such an exception had no such effect as it could not be extended by implication to include latent defect existing at the time of sailing. In the course of its opinion this Court said (*The Carib Prince,* 170 U. S. 655, at p. 659):

> "The principle upon which the ruling rested (referring to *The Caledonia*) was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage. The rule thus announced in *The Caledonia* but expressed the doctrine stated by Lord Selborne in *Steel v. State Line Steamship Co.,* L. R. 3 App. Cas. 72, that the exceptions in a bill of lading ought, if in reason it be possible to do so, to receive a construction not nullifying and destroying the implied obligation of the ship owner to provide a ship proper for the performance of the duty which he has undertaken."

Furthermore, to say that the incorporation of the Limitation Statute in the bill of lading has the effect of modifying the warranty of seaworthiness, especially when the implied absolute warranty has already been reduced by contract to an obligation to see to it that due diligence is used to make the ship seaworthy, is to say that in so far as risk from fire is concerned, the owner may by contract relieve himself from his own negligence in respect of fire, and that the shipowner is under no obligation to see to it that his ship is seaworthy in respect of fire. This we submit is exactly what this Court said in *Phenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322, a shipowner under our law is not permitted to do.

Although it is unnecessary to our argument in the present case, it should not be overlooked that there is still a broader principle which precludes the conclusion reached by the Court below, namely, that the fire statute does not purport to relieve a shipowner from his liability for negligence as that liability was defined before the fire statute was enacted. The statute has merely the same legal effect as an express stipulation in a bill of lading excluding liability for damage from fire. Such an exception by contract or statute against damage by fire does not relieve from liability for negligence.

In *Phenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, at page 322, this Court said:

> "The stipulation in these bills of lading that the carriers 'shall not be liable for loss or damage by fire, collision, or the dangers of navigation', clearly does not protect them *from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage, that a common carrier shall be exempt from liability for loss caused by negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void.*

Railroad Co. v. *Lockwood,* 17 Wall. 357; *Railroad* v. *Pratt,* 22 Wall. 123; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174; *Railroad Co.* v. *Stevens,* 95 U. S. 655." (Italics ours.)

In dealing with this question as to the effect of an exception or statute exempting from damage by fire on the liability of a shipowner for negligence in connection with unseaworthiness, the Circuit Court of Appeals in the present case relies on certain English decisions. One of them is a decision of the House of Lords—*Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, L. R. 1931 A. C. 726. It failed to note, however, that the shipowner in that case was not a common carrier at all (see L. R. 1931 A. C., at pp. 731 and 743), and that the House of Lords was dealing with a case where the Trial Judge had found that there was no negligence on the part of anybody. The following is the finding of Mr. Justice Wright, the Trial Judge, which was accepted by the House of Lords:

> "A survey might well not have revealed the danger. If I do not feel able to say definitely that the master was in fault in doing as he did, I do not feel able to say that the managers were in fault in not imposing on the master specific instructions" ((1930) 1 K. B. 699, at p. 711).

Moreover, the contract of affreightment in the *Tempus Shipping Company* case was evidenced by a charter party, the usual document used for freighting a vessel as a private carrier, and the bill of lading contained no such provision as appears here. Viscount Dunedin in the course of his judgment, took occasion to emphasize this fact. See *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* (*supra*), at pages 733, 734.* But even should we assume that the facts in the two cases were identical, there is a funda-

*Also the word "actual" which appears in the British statute before the words "fault or privity" is not contained in our statute. See Appendix A of this brief.

mental distinction between the law of the United States and that of England which renders the English cases inapplicable here. Indeed, Lord Atkin in his judgment in the *Tempus Shipping Company* case (*supra*), at pages 751, 752, declined "to deal with" a decision of this Court for that reason. He said:

> "I have not thought it necessary to deal with the decision of the Supreme Court of the United States in *The Irrawaddy*, 171 U. S. 187, because, as pointed out by Greer, *L. J.*, in the Court of Appeal, that case was decided on distinctions then existing* between the law of the United States and this country to which the majority of the Supreme Court expressly drew attention."

See also *Tempus Shipping Co.* v. *Louis Dreyfus & Co.* (1931), 1 K. B. 195 at p. 214, where in the Court of Appeal Lord Justice Greer points out the distinction between our law and that of England "on the question of the liability of a shipowner to a cargo owner", which is the precise question involved here.

Upon examination of this Court's decision in *The Irrawaddy, supra,* it will be found that the distinction referred to by Lord Atkin is (171 U. S. 187 at p. 195):

> "By the English law, the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit."

Whereas, in the United States—(*The Irrawaddy*, 171 U. S. 187, at 190)

> "it is the well-settled law of this court that a com-

---

* Lord Atkin was under a misapprehension if he meant to imply that the law as stated in *The Irrawaddy* has since been changed, either by Act of Congress or by decision of this Court. Indeed, later decisions of this Court reiterate the doctrine of *The Irrawaddy*. See *The Chattahoochee*, 173 U. S. 540, 554; *Knott* v. *Botany Mills*, 179 U. S. 69, 73; *The Southwark*, 191 U. S. 1, 6; *The Jason*, 225 U. S. 32, 49, 52, 54.

mon carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from responsibility for loss or damage arising from the negligence of the officers or crew; that it is against the policy of the law to allow stipulations that will relieve a carrier from liability for losses caused by the negligence of himself or his servants. *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397.

Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy at the time of beginning her voyage, or that he has used his best efforts to make her seaworthy; and that his undertaking is not discharged because the want of fitness is the result of latent defects. *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408; *The E. J. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124."

In England a shipowner may, as this Court pointed out in *The Irrawaddy*, 171 U. S. 187, make any contract he sees fit, and the English courts deal with a bill of lading clause providing that a shipowner shall be exempted from unseaworthiness when he has used due diligence to make his ship seaworthy, as a contract on the part of the shipowner *to exclude* the Fire Statute. See *Virginia Carolina Chemical Co.* v. *Norfolk, etc. S. S. Co.* (1912), 1 K. B. 229; *Ingram & Royle* v. *Services Maritimes du Treport* (1914), 1 K. B. 541, at page 554. The Circuit Court of Appeals in the present case has chosen to follow the theory announced in these English cases. These English cases proceed on the assumption that the Fire Statute, which is but a part of the Limitation Statute (as appears from the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, at page 331;—see also *La Bourgogne*, 210

U. S. 95, at pages 120-122, and *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 518), applies to the personal obligation of the shipowner. This Court, however, has taken an entirely different view. *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at page 149; and *Pendleton* v. *Benner Line*, 246 U. S. 353.

In the English cases just cited, the court interpreted the Fire Statute as applying to unseaworthy vessels because, said the court, if the Statute did not apply to unseaworthy vessels, then the word "seaworthy" would have to be read into the British Statute so as to make the Statute read "in seaworthy British vessels". It is obvious, of course, that both the British and American Fire Statutes do apply to unseaworthy vessels in so far as the loss results from fire and not from unseaworthiness. But this Court's rule is that the Statute has no application to liabilities flowing from unseaworthiness when there is a personal undertaking that the shipowner will see to it that his vessel is seaworthy, or where the unseaworthy condition is discoverable by use of due diligence before sending the vessel to sea. *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139. Having no application to such liabilities, it is difficult to see how incorporating the Statute in the bill of lading affects the matter. Or to put the law as expressed by this Court in *The Malcolm Baxter, Jr.* (*supra*), our law, at least in so far as common carriers are concerned, is that the Act of 1851 has no application to losses flowing from a failure to use due diligence to make a vessel seaworthy at the time she sails from the loading port. This Court has consistently refused to take the view of the English courts that a shipowner may contract as he pleases to exclude liability under a contract of carriage when such exclusion involves absolving a carrier from a personal duty of seeing to it that due care is used to make the vessel seaworthy on

sailing from the loading port. And even if we assume that the facts in the *Tempus Shipping* case were the same as in the present case, the fundamental difference between the public policy of this country and that of England with respect to the personal duty of a shipowner makes those decisions of no value in the American courts "on the question of the liability of a shipowner to a cargo owner", Greer, *L. J.* (1931), 1 K. B. 195, at page 214.

This Court has carried this fundamental principle of public policy to the extent of holding that no provision in the bill of lading should be construed by implication to diminish the obligation of a shipowner to supply a seaworthy ship. *The Caledonia, supra,* and *The Carib Prince, supra.* To give the provision of this bill of lading any such interpretation as that given by the Circuit Court of Appeals, is, we submit, not only in the very teeth of the recognized public policy of our law, as announced by repeated decisions of this Court, but also in the teeth of the fundamental rules of construction repeatedly stated by this Court.

The practical application of the principles upheld by this Court renders impossible the result reached by the court below, viz., that a shipowner, who gives no care to his ships, is offered greater legal protection than a shipowner who uses some but not sufficient effort to fulfill his obligation to make his ship seaworthy. We know of no case where this Court has sanctioned the failure of a shipowner to use due diligence to make his ship seaworthy, and, in the only case which we know of—*International Navigation Co.* v. *Farr,* 181 U. S. 218—where it was contended that the negligence of a sea servant in the loading port in respect of seaworthiness should be dealt with differently from that of a shore servant, this Court emphatically repudiated such a contention. This Court has consistently held that a shipowner must be held to his duty, personally assumed in his contracts, to make his

ship seaworthy up to the time of sending her to sea from the loading port, or at the very least, to see to it that due diligence is used to make her seaworthy.

II. The warranty that the "Galileo" at the time of sailing from the loading port would in fact be seaworthy so far as use of ordinary care could make her seaworthy, and in addition that "the owners" (R. 30A) would "exercise due diligence to make the steamer seaworthy", was a personal contract of the respondent shipowner, for the breach of which it is responsible. The respondent, through its New York managing agent, held itself out in New York, the loading port, as a common carrier under its corporate name, and personally contracted and warranted through such agent that the vessel on sailing would in fact be seaworthy so far as the exercise of ordinary care could make her so.

As this Court held in *Pendleton* v. *Benner Line*, 246 U. S. 353, and in *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, it is unnecessary on facts such as exist in the present case, where there is a personal promise or warranty, to determine whether or not the respondent's managing agents at Hull or New York personally committed a negligent act independently of any contractual duty or promise, because where such contractual promise or warranty exists, a simple breach of it, or failure to perform, is sufficient to constitute personal failure or fault of the shipowner. In the present case, the respondent personally, through its duly authorized managing agents at New York, promised and warranted in the contracts of affreightment that the "Galileo" would in fact be seaworthy at the time of sailing from the loading port, New York, so far as the exercise of ordinary care could make her so. The mere breach of that personal contract, therefore, constituted neglect of the respondent corporation personally, depriving

it of the benefit of the Limitation Act in 1851, of which the so-called Fire Statute is a section.

In *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at page 149, this Court said:

> "The owners contend that, under §4283 of the Revised Statutes and §18 of the Act of June 26, 1884, c. 121, 23 Stat. 53, 57, their liability should have been limited to the value of the ship and her pending freight; because the District Court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the Circuit Court of Appeals. But the liability of the owners sought to be enforced here is one resting upon their personal contract; *and to such liabilities the limitation acts do not apply.*" (Italics ours.)

In *Pendleton* v. *Benner Line*, 246 U. S. 353, at page 357, this Court said:

> "It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not."

And in *Richardson* v. *Harmon*, 222 U. S. 96, at page 106, this Court said:

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."

In the light of these decisions, it is obvious that if the contract is a personal contract, there can be no question as to the petitioners' right to recover their damages in full from the respondent. The Circuit Court of Appeals made no finding that these contracts were not personal. Most of the cargo was carried under bills of lading which were issued in the respondent's name by its New York wholly owned subsidiary, as agent in charge of the respondent's business at New York.* The remainder of the cargo was carried under bills of lading not issued in respondent's name but ratified by it by accepting the goods at New York as a connecting common carrier for carriage on the "Galileo" to Europe; and the respondent has furthermore admitted that it authorized the signing and issuance of all the bills of lading (R. 23, 24, 51, 555). Ellerman's Wilson Line, New York, Inc., which signed the first class of bills of lading on behalf of the respondent, was a corporation whose stock was entirely owned by the respondent (R. 343, 347). When the cargo was booked, there was an active correspondence between Ellerman's Wilson Line, New York, Inc. and Ellerman's Wilson Line, Ltd. as to the character of the cargo and the freight to be charged therefor (R. 350 *et seq.*). A good portion of the cargo of the "Galileo" had been booked before she arrived at New York (R. 344). On August 20, 1926, New York had informed Hull of the quantity of cargo it had booked up to that time for Hull, Newcastle and Antwerp (R. 353). On August 28th New York informed Hull by cable of the exact quantity of cargo aboard the "Galileo" at the time the "Galileo" sailed (R. 350). On August 31st New York cabled Hull informing Hull of the exact amount of freight which the vessel would earn for the voyage (R. 350). It is therefore clear that in booking, accepting and issuing bills of lading for

* The record shows that the bills of lading covering the following shipment or item numbers were so issued (R., 50 A): 1, 2, 3, 4, 5, 6, 7, 8, 9, 112, 119, 120, 122, 128, 129, 153, 157, 167, 169, 171, 180, 186, 192, 195, 196, 197, 198, 199, 200, 203, 206, 207, 208, 209, 210, 211, 212, 221, 222, 223, 224, 225, 226, 227, 228, 243, 245, 246.

this cargo, Ellerman's Wilson Line, New York, Inc. was not only acting on express authority previously received from the respondent, but that respondent itself was urging its agent to exercise that authority on its behalf while its agent was booking this very cargo. Therefore, when the bills of lading were signed by Ellerman's Wilson Line, New York, Inc. in the name of the respondent, these contracts became the personal contracts of the respondent.

It has been settled in this country by a long line of decisions that where, as here, a corporation is doing business elsewhere than at the place where its corporate officers reside or have their offices, and has committed or delegated the conduct of its business at that place to an agent, then the knowledge and privity of such agent is that of the corporation personally:

In re Jeremiah Smith & Sons, 193 Fed. 395 (C. C. A. 2);

In re P. Sanford Ross, 204 Fed. 248, 250, 251 (C. C. A. 2);

The Drill Boat No. 4, 233 Fed. 589, 595 (Dis. of Mass.);

The Benjamin Noble, 232 Fed. 382, 397;

The No. 6, 241 Fed. 69, 71 (C. C. A. 2);

Boston Marine Insurance Co. v. *Metropolitan Co.,* 197 Fed. 703 (C. C. A. 9);

Parsons v. *Empire Transportation Co.,* 111 Fed. 202 (C. C. A. 9), certiorari denied 183 U. S. 699;

The Colima, 82 Fed. 665;

Oregon Lumber Co. v. *Portland & Asiatic S. S. Co.,* 162 Fed. 912 (District of Oregon);

Sanbern v. *Wright & Cobb Lighterage Co.,* 171 Fed. 449, affirmed 179 Fed. 1021 (C. C. A. 2).

Consequently, in the present case, as the respondent was doing business in the loading port New York, through its

subsidiary Ellerman's Wilson Line, New York, Inc., in which it owned all the stock, the contracts made by such agent were the contracts of the respondent personally.

With respect to all of the cargo shipped on the "Galileo", as appears from the references to the record given on page 60 of this brief, the respondent knew exactly what cargo the "Galileo" was carrying (R. 349, 350, 351, 353). By letter dated the 19th of August, 1926, addressed by the respondent to its agent in New York, the respondent expressly hoped that the agent at New York would "be able to give her approximately complete homeward cargo" (R. 351), and in the letter dated Hull, August 12, 1926, received by the New York agent August 21, 1926, it was stated: "Grain engagements * * * We hope you will be able to continue booking at certainly not less than 2/6 d" (R. 351). On August 20, 1926, the agent sent to Hull a letter in which they asked the quantity of the "present cargo prospects" (R. 351, 352). On the 3rd of September, 1926, the New York agent addressed to the respondent a letter specifying in detail the exact tonnage and the exact amount of freight covering the entire cargo (R. 350, 351). It, therefore, appears that the booking and actual issuance of contracts of affreightment on the cargo of the "Galileo" was with the full approval and ratification of the respondent at Hull. It is immaterial that certain of the contracts were not physically signed by the respondent. See *Great Lakes Towing Co.* v. *Mills Transportation Co.*, 155 Fed. 11, at page 20, where the court held that it was immaterial that the name of a contractor does not appear in a contract, and that although the name did not appear "it was not by that circumstance any the less a contract of the Mills Transportation Company". The court cited Story on Agency, §160a; Mechem on Agency, §§769, 772; *Higgins* v. *Senior,* 8 Mees. & W. 844; *Ford* v. *Williams,* 21 How. 287 and *Higgins* v. *McCrea,* 116 U. S. 671. See

also *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, at page 336, where this Court said:

> "But in this case in addition to the finding of the owner's privity to the unseaworthiness was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class."

See, also:

Higgins v. *McCrea*, 116 U. S. 671, at page 680.

It has long been settled that all of such contracts are personal to the shipowner. See *McPhail* v. *Williams*, 41 Fed. 61, at page 62, and *Gokey* v. *Fort*, 44 Fed. 364, at page 366.

As was said by Judge Nelson in *McPhail* v. *Williams*, 41 Fed. 61, at page 62:

> "Certainly there was no occasion for Congress to legislate to limit the liability of ship-owners on contracts which they enter into personally, or expressly authorize."

And by Judge Addison Brown in *Gokey* v. *Fort*, 44 Fed. 364, at page 366:

> "It has been held that the limitation provided by the act of 1884 upon the liabilities of the owners 'on account of the ship' does not extend to their personal contracts, but only to the debts and liabilities that arise out of the navigation or business of the ship, or from the contracts of the master, under his general powers in the course of the voyage. *The Amos D. Carver, supra; McPhail* v. *Williams*, 41 Fed. Rep. 61. Such has long been the construction of the broad provisions of the ordinance of Louis XIV, as well as of the similar provisions of section 216 of the Code of Commerce (1 Valin, Comm. 568); Emerigon, Cont. a la Grosse, c. 4, §11; 2 Desjardin, Droit,

Com. Mar. §§283-286; 2 Valroger, Com. du Code de Com. §256. And, in general, repairs made in the home port by the owners, or by their authorized agent, are treated as the personal debts of the owners, and cannot be discharged by a surrender of the vessel. *It is the same with the captain's foreign contracts from the time they are ratified by the owners.* Several of the maritime codes thus expressly provide. See Italian Code Mar. §491; 3 Revue, Internat. du Droit Mar. 316, 318; 4 Revue Internat. du Droit Mar. 337-339; and Desjardin, *ut supra.* Valin says: 'There are cases, however, in which the owner cannot free himself by making this abandonment. * * * The reason is, because these debts are his own personal debts, as much as if he had contracted them himself.' 'It is universally recognized in modern law,' says Desjardin (sec. 283), 'that the right of abandonment cannot be invoked by the owner in order to limit his own personal obligation. The right of abandonment ceases also if the obligation at first contracted by the captain is ratified by the owner; it is the same as if the owner had acted himself (Sec. 284). All legislations that permit the owner to limit his obligation by abandonment disallow this right from the time he has transformed the captain's engagement into his own personal obligation' (sec. 286). In the case of *Norwich Co.* v. *Wright,* 13 Wall. 104, 120, and of *The Scotland,* 105 U. S. 24, 28, 29, Mr. Justice Bradley, in delivering the opinion of the Supreme Court, states that 'the act of Congress seems to have been drawn with reference to these previous laws,' and that 'the rule adopted by Congress is the same as the rule of the general maritime law.' *The City of Norwich,* 118 U. S. 468, 490, 6 Sup. Ct. Rep. 1150. The general purpose of both is the same. The object of both was to encourage ship-building and commerce, and to enable persons having a moderate capital to engage in commerce without becoming liable for an

indefinite amount beyond what was invested in the enterprise, through the faults or contracts of others. This principle becoming, early in the middle ages, a rule of the maritime law, secured, to a considerable extent, for persons engaging in commerce, the same beneficent results that the municipal law adduced by other means; namely, by the formation of corporations, and, more latterly, by associations 'limited,' by which individuals may engage in trade without being liable beyond the amount of invested capital." (Italics ours.)

We showed under Point 1A of this brief that even if the Fire Statute is incorporated in a bill of lading, the duty (and *a fortiori* the personal contract, if one exists) to exercise due diligence to make a ship seaworthy remains unaffected. We have now shown under Point II that when the "Galileo" was permitted to sail in an unseaworthy condition, which was discoverable before sailing, there was a breach of the personal contract entered into in this case. To the liability thus created by the breach of duty or the breach of contract, neither the provisions relating to exoneration from or limitation of liability contained in the Limitation Act of 1851 have any application. Certainly no one reading the clause in the bill of lading as to the shipowner's liability for unseaworthiness would interpret the reference to the Fire Statute in another clause in the bill of lading as a modification of that provision. Nor would the well-settled principles of construction as announced by this Court in *The Caledonia,* 154 Fed. 124 and *The Carib Prince,* 170 U. S. 655, permit such an interpretation.

Conclusion.

The Circuit Court of Appeals took the view that an unqualified acceptance of this Court's language in the *Malcolm Baxter, Jr.* would disturb a "long established con-

struction" of the Act of 1851. We submit that this view is clearly erroneous. Even more clearly mistaken was the assumption of the Circuit Court of Appeals that the petitioners' argument involved a novel construction of the Act of 1851. There may be room for argument as to the precise standard of care which this Court meant to lay down in the *Malcolm Baxter, Jr.*, but we think there can be no doubt that some duty rests upon a shipowner in the matter of making his vessel seaworthy. In a case like the present it is unnecessary to determine the exact standard of care to be applied; for whatever standard is adopted, it is clear that the shipowner in this case failed to comply with it. We have found no case—and certainly none has been cited, where either the courts of the United States or of England have ever held that a shipowner was entitled to exoneration from or limitation of liability under the Act of 1851 (or the similar British statute) in respect of damages resulting from the fact that his vessel was grossly unseaworthy at the time of sailing, when such unseaworthiness was readily observable and had actually been observed by unskilled persons. Under these circumstances, we think it is fair to say that it is not the petitioners but the respondent who seeks to establish a new rule of construction in the present case.

Such a rule of construction as adopted by the Circuit Court of Appeals is a general invitation to shipowners to cease to inspect their vessels and to keep in ignorance of their condition. That any such doctrine will inevitably lead to serious losses, seems clear; for ship's officers are not always thanked for erring on the side of safety as against the side of economy.*

---

*In *Fiumana* v. *Bunge*, L. R. (1930), 2 K. B. 47, it is said (at p. 60):

> "The practice of carrying bunker coals on the voyage out and back may always I think involve this risk of fire. * * *
> In the present case the possibility of coal deteriorating before the grain is loaded cannot be absent from the shipowner's mind. Indeed, the practice is adopted I imagine from motives of economy."

We cannot believe that this Court will place its approval upon any such doctrine, especially when it involves a departure from previous decisions of this Court.

The decision of the Circuit Court of Appeals for the Second Circuit should be reversed, and the cause remanded to the District Court with directions to enter a decree awarding petitioners their damages as against the respondent together with interest and costs.

Respectfully submitted,

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel for Petitioners.

APPENDIX A.

U. S. Code, Title 46, Sec. 182 (R. S. 4282, derived from Act of March 3, 1851, c. 43, §1, 9 Stats. at L. 635):

§182. LOSS BY FIRE. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

U. S. Code, Title 46, Sec. 183 (R. S. 4283, derived from Act of March 3, 1851, c. 43, §3, 9 Stats. at L. 635):

§183. LIABILITY OF OWNER NOT TO EXCEED INTEREST. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

U. S. Code, Title 46, Sec. 191 (Section 2 of The Harter Act, Act of Congress, February 13, 1893, c. 105, §2, 27 Stats. at L. 445):

§191. STIPULATIONS RELIEVING FROM EXERCISE OF DUE DILIGENCE IN EQUIPPING VESSELS. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

BRITISH FIRE STATUTE (Section 502, paragraph i, of the British Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60):

The owner of a British seagoing ship, or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

U. S. Code, Title 46, Section 181 (Section 4281 R. S.):

"If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered."

U. S. Code, Title 46, Section 187 (Section 4287 R. S.):

"Nothing in the five preceding sections (R. S. 4282-4286) shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers, or seamen for or on account of any embezzlement, injury, loss, or destruction of merchandise or property

put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seamen of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

APPENDIX B.

Pertinent clauses in the forms of bills of lading covering most of the cargo in this case (R. 30 A, 50 A):

"IT IS MUTUALLY AGREED that the steamer shall have liberty to sail with or without pilots; to tow and assist vessels in distress; that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods; and, in case the steamer shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage to transship the goods to their destination by any other steamer; that the carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after or during or while waiting loading, transshipment, discharge, delivery or other disposition of goods, or on board, or in lighters or craft, or on wharf or in warehouse, at any port or place, occasioned by any of the following excepted causes, throughout this contract always excepted; By perils of the sea or other waters, by fire or flood, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; theft or pilferage on board, in craft, or on shore; by arrest or restraint of princes, rulers or people, riots, strikes, lock-out, stoppage of labor, labor disputes or labor disturbances of any kind, or by any reasonable course of action adopted by the Shipowner or other person whomsoever in contemplation or consequence thereof or in connection therewith; by explosion, bursting of boilers, breakage of shafts, of any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy;

by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, chafage, vermin, or by explosion of any goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods, the insufficiency of packages, or from the carriage of livestock and/or cargo on deck; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, addresses or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value. General average payable according to York-Antwerp Rules. If the owner of the steamer shall have exercised due diligence to make said steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the steamer, or from latent or other defects, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees, or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but, with the shipowner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness. It is further agreed that, in addition to the liability of any other person as owner of the goods, the shipper shall be liable for all contributions in general average and special charges payable in respect of the goods, whether or not he be liable therefor as owner of the goods.

IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc. and to Sections 4281 and 4287, each inclusive, of the United States Statutes."

[See also pp. 8, 9 and 49, 50 of this brief.]

THE COURT PRESS, INC.

FILE COPY

OCT 10 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 20

EARLE & STODDART, INC., ET AL., PETITIONERS,

against

ELLERMAN'S WILSON LINE, LTD., OWNER AND OPERATOR OF THE STEAMSHIP "GALILEO", RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
The attack in respondent's brief on the concurrent finding that the unseaworthiness preceded the fire	2
The respondent now admits in effect that much of the cargo was accepted on board after the unseaworthiness was observable	6
Respondent does not argue in support of the decision below on the first point in petitioner's brief	8
No agreement was entered into in the Circuit Court of Appeals or in the District Court that fire was the proximate cause of the loss, nor did either court below decide that fire was the proximate cause	12
The libel pleaded non-delivery by a common carrier, as in the Malcolm Baxter and Wildomino cases. Respondent set up the defense raising the question of seaworthiness, and pleaded affirmatively that the Galileo was seaworthy	15
The loading and carriage of the new lot of 850 tons of coal for the steamer Francisco was not a routine duty of the chief engineer of the Galileo	17
"Concessions" alleged by respondent but never made and not contained in the record	20
Respondent incorrectly states the facts in The Malcolm Baxter case	20
Petitioners do not rely on cases involving the Harter Act	27
Respondent's extended argument and quotations regarding "waiver" are wholly irrelevant. Petitioners do not claim or plead any waiver	29
Respondent's statements with reference to The Etna Maru case are incorrect	31
The statement in petitioner's main brief that most of the cargo was carried under Bill of Lading Form A is correct	32
Respondent's statement that petitioners did not contend in the District Court that any of the bills of lading were "personal" contracts is incorrect	33

List of Decisions Cited.

American Hawaiian Co. v. Pacific Co., 41 Fed. 2d 718	29
Arkell v. United States, 13 Fed. 2d 55	32

Page

Caledonia, 157 U. S. 137..... 10, 21, 28
Carib Prince, 157 U. S. 124..... 28
D'Utassy v. Mallory S. S. Co., 162 A. D. 410..... 30
Edwin I. Morrison, 153 U. S. 199, 215..... 10, 21
Etna Maru, 33 Fed. 2d 232..... 9, 12, 28, 31, 36
G. R. Booth, 171 U. S. 450..... 38
Inland v. Hallett, 52 Fed. 2d 13..... 16
International Co. v. Farr, 181 U. S. 218..... 26
John H. Starin, 191 Fed. 800, 801, 802..... 17
Kitsap v. Harvey, 15 Fed. 2d 166..... 29
Lord v. Goodall, 4 Sawy. 292..... 21, 32
Luckenbach v. McCahan Co., 248 U. S. 139, 150..... 10, 21, 36
Malcolm Baxter, Jr., 277 U. S. 323, 333..... 10, 20, 21, 24
Moore v. American Co., 24 How. 1..... 28, 29
New Jersey Co. v. Merchants Bank, 6 How. 344..... 25
Paterson v. Elder Dempster, L. R. 1924 A. C. 522, 548..... 26
Pendleton v. Benner Line, 246 U. S. 353..... 28, 36
Quinlan v. Pew, 56 Fed. 111..... 28
Royal Exchange v. Kingsley, 1923 A. C. 235, 244..... 10
Southwark, 191 U. S. 1, 9..... 6
Sylvia, 171 U. S. 462, 464..... 6
Walker v. Transportation Co., 3 Wal. 150..... 3, 19, 20
Wildcraft, 201 U. S. 378..... 27
Wildomino, 272 U. S. 718..... 17

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 20

EARLE & STODDART, INC., ET AL., PETITIONERS,

against

ELLERMAN'S WILSON LINE, LTD., OWNER AND OPERATOR OF THE STEAMSHIP "GALILEO", RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

Respondent, instead of indicating any alleged inaccuracies in the statement of facts contained in our brief, has presented in its brief an entirely independent statement of facts. This new statement is full of

inaccuracies, and, indeed, presents a case which is essentially different from that stated in the courts below.

Respondent now abandons its main contention in the courts below that it was chief engineer Oxtoby's negligence in loading the new lot of 850 tons of coal for the steamer *Francisco,* and not the hot and gaseous condition of respondent's old bunker coal on the steamer *Galileo,* that caused the fire.

Under the title, "Statement of Facts", at page 3 of respondent's brief, it is said:

> "The fire in the 'Galileo's' bunkers concededly made the vessel unseaworthy. Any such fire in a ship, of course, renders a vessel 'unseaworthy' in the broad sense in which the term is sometimes used.
>
> The assertion frequently made in petitioner's brief that 'unseaworthiness' caused the fire is not accurate. The fire rendered the vessel unseaworthy."

And at page 5 of respondent's brief, under the same title, it is said:

> "In fact, a strong odor of coal gas, as a result of the combustion on the 'Galileo', was detected by Magarelli on a coal boat alongside the vessel (R. 331). The odor of coal gas proves that some of the coal had reached the ignition point" (R. 485).

And at page 9 of respondent's brief, it is said:

> "Concededly the 'Galileo' was unseaworthy *because of the fire.*"

And at page 21 of respondent's brief, discussing the *Walker* case, it is said:

> "This case disposes of any suggestion that an owner's defense under the Fire Statute depends on whether the fire is caused before or after the commencement of the voyage."

At page 30 of respondent's brief, it is said:

> "In precisely the same way, the Propeller 'Falcon' in *Walker* v. *Transportation Co.*, 3 Wall. 150, discussed at page 19 of this Brief, was also unseaworthy because of the neglect of the crew in allowing the fires to burn during the night while the propeller was lying at the wharf, and in leaving these dangerous fires burning without anybody to watch them."

And at page 31 of respondent's brief, it is said:

> "This court, therefore, in the *Walker* case specifically rejected the contention here made that a dangerous fire left on board a vessel through the negligence of the officers before the commencement of the voyage, and which causes the loss of the vessel, deprives the owner of the benefit of Section 1 of the Limited Liability Act of 1851, the so-called Fire Statute."

The uncontradicted evidence is that at the time that Magarelli detected the odor of coal gas "on the morning of August 25th" (Respondent's Brief, p. 5), which respondent argues "proves" that the fire then existed, the loading of the new lot of 850 tons of coal which the owners had ordered for another of their vessels, the Francisco (R. 589), had just commenced

(Respondent's Brief, p. 5). This is shown by the very page of the record (Record, p. 331) which is cited at page 5 of respondent's brief in support of the statement that Magarelli detected a strong odor of coal gas while on the coal boat alongside the vessel. Magarelli there says (R. 331):

> "Q. When you were speaking about the hold being warm, which lot of coal are you talking about, the coal that was already there, or the coal that you were going to put in?
>
> A. The coal that were in.
>
> Q. You mean the coal that was there before?
>
> A. Yes.
>
> Q. Was there any smoke you could see, or gas you could smell?
>
> A. I could smell the gas over the side, there was gas come on the coal boat."

Yet both courts below have found that it was the loading of the new coal by Oxtoby, and not any fire existing in the old coal, which was the cause of the loss. There is no support in the opinions below for respondent's statement that either court below found that fire was the proximate cause of the loss.

According to respondent's present contention, repeated throughout its brief, the negligence of Oxtoby in loading the new coal had nothing whatever to do with causing the fire or the unseaworthiness. Respondent now argues that the Galileo was unseaworthy to the point of being on fire before Oxtoby committed his alleged carelessness, and therefore that a previously-existing fire, and not Oxtoby's later negligence, was the proximate cause of the loss.

The District Judge was most positive in his findings that

> "Assuming the heated condition of part of the old coal, I am convinced that the new supply would have caused the fire in even a perfect bunker" (R. 587).
>
> "Unquestionably the immediate cause of the fire was the gross negligence of the ship's chief engineer in putting a new supply of coal on top of old coal that had become heated in the temporary bunker" (R. 582).
>
> "The 160 tons had been in it for almost two months, which is longer than would be expected, as the 'Galileo' was operated, *yet no fire occurred in it until it was covered with a new supply*" (R. 586).
>
> "Certainly the immediate cause was the gross negligence of the chief engineer in loading the new supply on top of the old coal which contained hot spots" (R. 587).
>
> "There remains for consideration the question whether respondent is liable on account of the unseaworthiness caused by the negligent act of the chief engineer in loading a new supply on the hot coal" (R. 587).
>
> "Concededly at the commencement of the voyage the 'Galileo' had within her a condition so dangerous that a bunker fire was inevitable and did in fact result within six hours" (R. 588).

On August 28, 1926, "at 12:50 P. M. the anchor was weighed and the vessel proceeded to sea" (R. 59). At 4:35, on August 28, 1926 (R. 59), within six hours after leaving New York, a fire broke out which was uncontrollable without help from shore (R. 62).

The Circuit Court of Appeals found that "Within six hours of her departure fire was discovered in the coal carried in a temporary bunker in No. 3 'tween deck" (R. 642). "The new coal was taken on a day or two before the 'Galileo' sailed, so that at the commencement of her voyage there existed within her, as the court expressly found, a condition so dangerous that a bunker fire was inevitable. Therefore, within authoritative definitions of seaworthiness (*The Sylvia*, 171 U. S. 462, 464; *The Southwark*, 191 U. S. 1, 9) the 'Galileo' was unseaworthy when she sailed and this was due to her chief engineer's negligence" (R. 642). These attacks by respondent itself on the decision of the Circuit Court of Appeals constitute additional ground for a reversal by this Court.

The record shows that at the time that respondent now contends that the fire existed (namely, when Magarelli detected the odor of coal gas on the morning of August 25) (Respondent's Brief, p. 5), a large and unspecified part of the petitioner's goods had not yet been loaded by the respondent on board the "Galileo." The log book of the "Galileo" (Respondent's Exhibit B, Record, pages 570-B, 570-C and 570-D) shows that the loading of cargo was not completed until 9:15 a. m. on August 28, 1926, and that the vessel left her berth at 10:17 a. m. on August 28, and discharged tugs and proceeded at 10:20 a. m. on August 28. It shows that the vessel was bunkering on August 24, 25 and 26, and completed bunkering at 4:00 p. m. on August 26, but that cargo was being

loaded on August 23, 24, 25, 26, 27 and 28. The log book preceding August 23, 1926, has never been produced by respondent. The record thus shows without contradiction that a large part of the petitioner's cargo was loaded on board the "Galileo" after the time at which respondent now argues the fire had broken out. In other words, counsel for respondent's present argument is in substance that a shipowner is protected by the fire statute even if he accepts goods on board his ship after he has reasonable means of knowledge that his ship is already on fire. The obvious answer to respondent's present argument is that, if the ship is on fire at the time the shipowner accepts the goods on board for carriage, any resulting fire damage to such goods is not legally caused by "fire," but by the negligent act of the shipowner in accepting them for carriage with reasonable means of knowledge that the ship is unfit and unseaworthy to carry them. A shipowner would obviously be negligent in permitting his ship to leave port with an observable fire on board, which was easily extinguishable in port but would, as here (R. 62), be impossible for the crew to extinguish while on the high seas. If the ship is observably ablaze before and at the time she leaves port, the corporate shipowner cannot escape liability because of the mere circumstance that it preferred to remain in England and let the duty of managing its business as a common carrier in the loading port be transacted by a subsidiary. The difference between a ship violently ablaze and a ship on fire as described by respondent on page 5 of its brief is only of degree.

Counsel for respondent do not argue in support of the decision of the Circuit Court of Appeals on the first point in petitioners' brief (at pages 16 to 57). The first point in petitioner's brief had nothing whatever to do with Chief Engineer Oxtoby's negligence (which is respondent's first point), nor with the personal nature of the respondent's contract (which is respondent's only other point). Petitioners' first point was that the failure of the respondent shipowner and ship operator to supply a vessel and coal which were seaworthy and safe from fire on sailing (so far as use of ordinary care by an ordinarily prudent shipowner or manager in the loading port could make them so) constituted negligence of the respondent personally as the common carrier owing such duty to the shippers. Especially so where, as here, the uncontradicted evidence is that everybody looking in the coal compartment of the vessel in the loading port observed that the dangerous condition existed, and that it was foolhardy for the respondent to send the vessel to sea with petitioners' cargo on board. Ignorance by anyone in the loading port interested in the vessel of such an obviously dangerous condition is inconceivable. Indeed, counsel for respondent themselves stress the obviousness of the danger by stating repeatedly that the vessel was actually on fire before she left the dock. The only excuse offered for respondent is that the managing officers were all in England, and that although doing business as a common carrier in New York through a subsidiary 100 per cent owned by it, and issuing bills of lading there to American shippers, it had made

no provision for a managing agent or inspector at New York to attend to its business of seeing to it that its vessel was not obviously unfit at the time of being permitted to go to sea with the cargo on board. Counsel for respondent attempt to dispose of respondent's 100 per cent-owned subsidiary (R. 343, 347) or "agent" at New York (R. 335, 343, 344, 351), by contending that it was only a "freight agent." Not only was the so-called agent merely the respondent itself in another guise, but the "Galileo" was alongside the subsidiary's dock at New York when Magarelli, standing on the coal boat also alongside the "Galileo," detected the strong odor of coal gas which respondent states indicated the fire had broken out (Respondent's brief, page 5). Consequently, even a "freight agent" on the dock could not remain ignorant of the dangerous gas. It is immaterial therefore which of the respondent's representatives in New York was the managing agent through whom it under its corporate name as a common carrier was doing business. Every person whatsoever visiting the dock or the vessel had knowledge or reasonable means of knowledge of the obviously dangerous gas or unseaworthiness. The respondent consequently is chargeable with that knowledge.

The first point in petitioners' brief is based squarely on the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. (2d) 232, at p. 234, that

> "It is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees."

and on the decisions of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. at p. 333, that

> "But for all damages legally attributable to the breach of warranty of seaworthiness, petitioners may recover."

and in *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at p. 150, that the operator of a vessel

> "becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners."

and on the decision in *The Edwin I. Morrison*, 153 U. S. 199, at p. 215, that

> "The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure."

and on the decision in *The Caledonia*, 157 U. S. at p. 137, that

> "As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel."

Further in support of the first point in their brief, petitioners cited the decision of the Privy Council in *Royal Exchange* v. *Kingsley Navigation Co.*, 1923 Appeal Cases 235, at page 244, that

> "the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that the loss is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire within the protection of s. 7 (of the Canadian Water Carriage of Goods Act). The train of causation, from the unseaworthiness of the 'Queen City' to the outbreak of the fire, is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), A. C. 350, 369, the proximate cause of a loss is not necessarily the cause nearest in time."

The decision of the Circuit Court of Appeals in the present case is in conflict with all those decisions, and counsel for respondent nowhere in their brief have the temerity to contend that it is not so in conflict.

The first point in petitioners' brief to which respondent has not replied is supported by adequate citation of authorities at pages 16 to 53, inclusive. Moreover, all the decisions upon which the Circuit Court of Appeals relied in deciding against petitioners on that first point are distinguished and are shown to be inapplicable on the uncontradicted evidence. The District Court in its opinion stated the two points involved in substantially the same language as that used in petitioners' brief in this Court. The District Court said:

> "The libellants, however, contend that (1) as a matter of fact there was neglect by the owner in not maintaining such supervision as would have prevented or corrected the chief engineer's negligence, and (2) as a matter of law the negli-

> gence of the chief engineer is chargeable to the owner notwithstanding the distinction between the two in the statute" (R. 588).

The Circuit Court of Appeals in its opinion said:

> "The libellants attempt to attribute to the shipowner personal neglect contributing to the dangerous conditions which resulted in the outbreak of the fire * * *. Indeed if the respondent was under a duty to have the loading of coal inspected by anyone other than the ship's officers, it should have appointed a shore superintendent for that purpose" (R. 646).

This issue was the legal issue involved below. The determination of it by the Circuit Court of Appeals in a manner in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 Fed. (2d) 232, resulted in the present proceedings on certiorari. It is in no sense a question of fact but a question of law, as we have shown in petitioners' brief at pages 16 to 57.

The statement at page 8 of respondent's brief that: "In the Circuit Court of Appeals the parties agreed that the fire was the proximate cause of the loss (R. 642)", is wholly without support, either in the record or in fact. No agreement or concession whatever was made in the Circuit Court of Appeals with reference to fire being the proximate cause of the loss. Page 642 of the record, cited by respondent in support of its statement, is merely the page of the opinion of the Circuit Court of Appeals in which the statement

was made which was fully answered in the footnote at page 29 of petitioners' main brief, which is not mentioned by counsel for respondent in their brief. Indeed, the impression is sought to be given by respondent that there was some independent agreement other than that contained in the written stipulation which was filed in the District Court and in a part of the Record (R. 556). A similar misstatement appears at pages 2 and 3 of respondent's brief.

In the Circuit Court of Appeals we discussed that proposition under two headings: one at the beginning of our argument, the other at the end of our argument, as follows:

> "POINT I. The Court, having found that the condition of the 'Galileo' was such on sailing that fire was inevitable, and that this condition could have been ascertained on sailing, should have held as a matter of law that the fire originated as a result of the personal neglect of the respondent in failing to use diligence to make the ship seaworthy."
>
> "POINT VI. Libellants' losses were in consequence of unseaworthiness, and as the bill of lading provided that respondent should be liable for unseaworthiness where it failed to use due diligence to make the ship seaworthy, the respondent when it failed in that respect, breached its contract and *ipso facto* became liable because libellants' losses were caused by unseaworthiness and not by fire.
>
> 1. The libellants' loss was in consequence of unseaworthiness.
>
> 2. The fact that there was an intervening fire, does not make that fire the cause of the loss.

3*f*

> The cause of the loss was unseaworthiness.
>
> 3. The respondents are liable for all of libellants' losses because they resulted from unseaworthiness."

Respondent's position in the Circuit Court of Appeals was (we quote verbatim the First Point from its brief in that court):

> "First Point: The *proximate cause* of the loss of the 'Galileo' and her cargo was the negligence of Chief Engineer Oxtoby. For this reason all other circumstances injected into the case by appellants are immaterial." (Italics ours.)

We had specifically directed the Court's attention, at page 3 of our brief in the Circuit Court of Appeals, to the terms of the written stipulation (R. 554, 555) which the parties had entered into before the case was tried in the District Court. In its opinion the Circuit Court of Appeals said: "The parties agree that the fire was the proximate cause of the loss" (R. 642). As the stipulation constituted the only agreement between the parties, it never crossed our minds that the Court was doing otherwise than referring to the stipulation. In our brief in support of the petition for the writ of certiorari, we specifically called to this Court's attention the misapprehension which the Circuit Court of Appeals had of the terms of the stipulation (see pages 26 and 27 of our brief in support of the petition for certiorari). Respondent in its brief in opposition to the petition took no exception to our statement respecting the language of the Circuit Court of Appeals quoted above and did not so much as suggest that there

was any agreement of any kind other than that contained in the written stipulation (R. 554, 555). It now says for the first time (Respondent's Brief, page 8) that an entirely new agreement was made in the Circuit Court of Appeals and that this language used by the Court was based on a supposed new agreement. The Circuit Court of Appeals does not say when or where the agreement which it mentioned (R. 642) was made. Certainly, as the Court knew of the written stipulation in the record, if any new agreement had been made, the Court would have said so. Parties do not stipulate questions of law, they stipulate facts. And when the question of law alleged to have been stipulated was the issue on the appeal, as appears from the briefs of both parties, it is beyond our power of comprehension to understand how respondent can now say that the parties agreed that the fire was the proximate cause of the loss (Respondents' brief, p. 8).

Moreover, if any such new agreement had been made, it seems that the Circuit Court of Appeals went to unnecessary trouble in writing an opinion on the issue presented by Point I and Point VI in our brief in that Court, and by Point I of our opponent's brief in that Court. Obviously no agreement, oral or written, between the parties was made in the Circuit Court of Appeals, and our clear recollection is that there was no such agreement.

At pages 1 and 2 of respondent's brief the statement is made that the libel was "for loss and damage

to merchandise which occurred by reason or by means of a fire happening on the Steamship 'Galileo' in August, 1926." There is no reference to the record to support this statement, and when we turn to page 8 of respondent's brief, we find respondent saying: "Petitioners' libels merely alleged the shipment of cargo in good condition and the failure to deliver at destination." This latter statement is correct, with the addition that the libel alleged that the respondent was a common carrier.

The cases are collated in *Inland Waterways Corporation* v. *Hallet & Carey Co.*, 52 Fed. (2d) 13, at page 15, as follows:

> "The presumption was [at common law], in case of failure to deliver, that it [the carrier] was at fault; and the presumption was not rebuttable save as to the few exceptions, and the carrier had to prove itself within the exceptions. 4 Elliott on Railroads (2d Ed.) §1454; 10 C. J. p. 107, §129; 6 Am. & Eng. Encyc. of Law, p. 262; *Clark* v. *Barnwell*, 12 How. 272, 280, 13 L. Ed. 985; *The Niagara* v. *Cordes*, 21 How. 7, 22, 23, 16 L. Ed. 41; *Hall & Long* v. *Nashville & C. R. Co.*, 13 Wall. 367, 372, 20 L. Ed. 594; *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174, 181, 23 L. Ed. 872; *North Penn. R. Co.* v. *Commercial Bank*, 123 U. S. 727, 733, 8 S. Ct. 266, 31 L. Ed. 287; *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 509, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *The E. M. Norton* (C. C.), 15 F. 686. See *Chicago & E. I. R. Co.*, v. *Collins Produce Co.*, 249 U. S. 186, 192, 39 S. Ct. 189, 63 L. Ed. 552."

This was precisely the situation presented to this Court in *The Willdomino,* 272 U. S. 718, where as the record in that case in this Court shows, at pages 3 and 26, the libels were merely against a common carrier for nondelivery of the goods at destination. It is thus unimportant that there was no allegation of unseaworthiness in the libel. *The John H. Starin,* 191 Fed. 800, at pages 801, 802.

The statements in respondent's brief that the loading and carriage of the 850 tons of new coal which caused the fire was a routine duty of the chief engineer is not supported by citation of the record and is contrary to respondent's own uncontradicted evidence. The loading on the "Galileo" of the 850 tons of additional coal was in accordance with a peremptory cable issued personally by the managing officers of the respondent in Hull, England, to their New York subsidiary (R. 572, 572-A). The cable order specifically directed that all that coal was to be transferred to another steamer, the "Francisco," on arrival and delivery at destination. As the master of the "Galileo" testified (R. 277): "It is carried *as cargo* wherever you put it." (Italics ours.) There is no evidence that any of that coal was to be used by the chief engineer on the "Galileo." The New York subsidiary itself employed shore stevedores and longshoremen to do the loading of the coal. The evidence is uncontradicted that the chief engineer, Oxtoby, had no authority or jurisdiction whatever to use any of that coal in the furnaces

of the "Galileo" in the performance of any of his usual duties (R. 325). Nor did any of the engine-room or fireroom crew under Oxtoby have any right to use that coal. It was, as the master testified, "cargo" (R. 277). Its carriage and handling were therefore entirely outside the usual scope of the duties of either Oxtoby or any of his assistants. The cable order from respondent's managing officers at Hull was not directed to Oxtoby and there is no evidence that he was authorized to countermand it or was authorized by respondent to incur the expense of removing or shifting the "Galileo's" own bunker coal so that the additional cargo of coal could be carried for some other vessel.

The master of the "Galileo" testified that after Mr. Sanderson, the President of Ellerman's Wilson Line, New York, Inc. (R. 336), received the order from Hull to purchase the coal, the coal was purchased by Mr. Sanderson (R. 284). The coal was actually loaded on board by stevedores employed by Mr. Sanderson (R. 284), and was trimmed into the ship by trimmers employed by Mr. Sanderson (R. 285). The chief engineer himself here testified that this 850 tons of coal for the "Francisco" was not within his requirements as chief engineer of the "Galileo," but that the coal was ordered by Ellerman's Wilson Line, New York, Inc. (R. 325), who were the respondent's shore agents (R. 325).

Quite the contrary is the case with bunker coal for the "Galileo" according to respondent's witness Neale, the Vice President of Ellerman's Wilson Line, New York, Inc. (R. 337). Mr. Neale testified that the New York office has nothing to do with the shipping of such coal when it is required; that the chief engineer has au-

thority to require the amount of coal needed for the ship's use (R. 337); and that the New York office gives no instructions in such case (R. 337).

The respondent's own uncontradicted evidence in the present case therefore is that when the owners at Hull decided to carry on the "Galileo" the 850 tons of coal which the courts below held caused the fire, they did not even confer or communicate with Chief Engineer Oxtoby but issued their order directly to their New York subsidiary, who in turn, without consulting Oxtoby, employed shore stevedores and longshoremen to do the loading, and that such stevedores proceeded with the loading until the dangerously unseaworthy condition made normal continuance of their work impossible. On such evidence, we submit, it is simply preposterous for counsel for respondent to contend that it was "a usual and simple duty of a chief engineer" such as Oxtoby (Respondent's brief, page 40) to load and carry that 850 tons of coal. Indeed, as already indicated, the master of the "Galileo" testified that that 850 tons was being carried not as bunkers for the "Galileo," but "as cargo." Even more reprehensible is the following statement at page 40 of respondent's brief: "The owners of the 'Galileo' had appointed a competent chief engineer to supervise the coal. Such supervision is a usual and simple duty of a chief engineer. *Walker* v. *Transportation Co.*, 3 Wall. 150. No special skill was required for such a routine matter, as petitioners admit in their brief, p. 40. The owner, therefore, selected a competent person to perform a usual and simple duty." A reference to

page 40 of petitioners' brief shows that that entire page is devoted to a statement of the facts in the *Walker* case and not in the present case, and that the statement as to the routine duty as to banking of fires in the *Walker* case, was clearly made as distinguishing the *Walker* case from the present case, for in the *Walker* case no unseaworthiness was involved, and there was no failure of the shipowner to make his ship seaworthy at the time of sailing.

The "concessions" alleged at pages 3, 6, 9 and 40 of respondent's brief have never been made. They are not in the record or briefs, and no citation or reference is given to support them. Indeed, the concurrent findings are to the contrary (R. 588, 586, 642).

At page 45 of respondent's brief it is stated that the terms of the bills of lading are immaterial under the Limited Liability Statute. That contention is self-defeating, because if that were so the respondent would be precluded from relying on the term in the bill of lading reducing the implied absolute warranty of seaworthiness to a warranty of seaworthiness so far as due care by an ordinarily prudent shipowner in the loading port could make her so.

Respondent refers to our contention regarding the meaning of the decision in *The Malcolm Baxter, Jr.*, 277 U. S. 323, as contrary to all previous decisions.

We need not go further than a case cited by the Circuit Court of Appeals below. *Lord* v. *Goodall,* 4 Sawyer 323. In that case the court expressly stated that it was the duty of the shipowner to see that the ship when she sails is in a seaworthy condition and that a breach of this duty constitutes privity and knowledge. See our main brief at page 43 for the exact language of the court. Such also is the doctrine in *The Edwin I. Morrison* 153 U. S. 199; *The Caledonia,* 157 U. S. 137, and *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139.

It is repeatedly stated by respondent in its brief that in *The Malcolm Baxter, Jr.,* in the District Court, now reported 55 Fed. (2d) 312, the court found that no competent person was called in to examine the "Baxter" before she sailed from New Orleans. Not only was the master of the vessel there to inspect her, but a Captain Thompson, whose qualifications were in no way criticised, also examined the vessel on behalf of the owners, as did a surveyor of the New Orleans Board of Underwriters (*The Malcolm Baxter, Jr.,* 55 Fed. 2d., at p. 315). The respondent in that case did much more than did the respondent here. When *The Malcolm Baxter, Jr.,* case came before this Court, the facts were fully understood and stated in this Court's opinion (*The Malcolm Baxter, Jr.,* 277 U. S., at page 332). The statement contained in respondent's brief that the owners of the "Baxter" received a letter from the captain while the vessel was at Port Eads is wholly without support. All that the District Court says in this connection is that the captain wrote such

a letter. There was no evidence that the letter was received by the shipowner in New York, either before the "Baxter" sailed from Port Eads or at any time thereafter, and indeed Port Eads was an intermediate port, the loading port, New Orleans, having been left several days before. The captain in his evidence merely said:

> "Q. While lying at Port Eads did you communicate with the French Overseas Corporation?
>
> A. I remember writing them a letter.
>
> Q. Do you remember where that letter was addressed?
>
> A. It was addressed to 120 Broadway, New York City.
>
> Q. Do you remember when you wrote that letter?
>
> A. A few days after I arrived at Port Eads.
>
> Q. Do you remember what you stated in the letter?
>
> A. I cannot recall exactly what I stated. I mentioned the fact that I had discovered a leak and if it developed anything serious not to be surprised to see us in another American port, that I was too far down then to undertake to go back to New Orleans and I thought it would be advisable to see what developed."
>
> (See the record in *The Malcolm Baxter, Jr.*, No. 459, October Term, 1927, at pp. 205, 206.)

The quotation from 55 Fed. (2d) 316, on page 39 of respondent's brief, is absolutely all that the District Court said or could say with respect to the letter which the captain wrote. *On page 39 of respondent's brief, the*

paragraph following the quotation from Judge Knox's opinion, purporting to state additional facts, is not supported in any way by the record or by any finding made in The Malcolm Baxter, Jr., case. We were counsel in that case and have carefully checked the record. There is nothing in *The Malcolm Baxter, Jr.* case to show that any notice was brought home to the owners that the vessel was unseaworthy, and consequently, the statement that the owners did nothing after such notice and for this reason the ship was properly condemned, is a clear misapprehension by respondent's counsel of the facts as shown by the record and opinions in that case. It is noteworthy that the respondent gave no citation of either the record or the opinion in that case to support those statements of alleged facts. These statements are clearly opposed to the statement of facts given by this Court and by the Circuit Court of Appeals and the District Court in the *Baxter* case. This statement is repeated in respondent's brief at the bottom of page 39. But here also we find no reference by respondent's counsel to support their statement as to these alleged facts.

At the bottom of page 39 of respondent's brief it is stated that the lack of diligence which Mr. Justice Stone "was talking about in his opinion in a non-technical sense was the personal conduct and personal knowledge of the owner in the *Malcolm Baxter* case which amounted in law to the privity and knowledge required by the statute." When we examine the findings of fact of the District Court, in that case, which were concurred in by this Court, we find that this is

not what the District Court held. The District Court says:

> "In my opinion it was of the essence of the present contracts of affreightment that the 'Baxter' was, when the contracts were made, able to perform her undertaking. It was not the agreement that the vessel should *thereafter* become able to go forward. If such were the case the effect would be that claimants assumed all the risk incident to petitioners' efforts to make good its contract. This, I think, claimants were not called upon to do.
>
> Having found the breach of warranty as to seaworthiness to have been an effective and continuing cause of frustration, there is no reason, that I can see, why petitioners should be relieved of liability merely because an additional cause of frustration intervened. The last cause was only incidental to the first." 55 Fed. (2d) at page 316.

It is obvious from Judge Knox's opinion, and we find nothing in either the opinion of the Circuit Court of Appeals or in the opinion of this Court in the *Baxter* case to in any way qualify it, that the failure of the shipowner to use due diligence to make his ship seaworthy, constituted such neglect as to preclude him from claiming the privilege granted by the Limitation Act in so far as damages flowing from the unseaworthiness were concerned. Indeed in this Court's decision in *The Malcolm Baxter, Jr.*, 277 U. S. 323, this Court said: "But for all damages legally attributable to the breach of warranty of seaworthiness petitioners may recover."

At pages 10 and 19 of respondent's brief, it is stated that the steamer "Lexington" involved in the case of *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, was unseaworthy, and that the fire was an inevitable consequence of the unseaworthiness. We submit that those statements are wholly unwarranted by the facts in that case. The "facts" of that case as stated on page 18 of respondent's brief, are not supported by citation of pages of the printed report and are obviously taken from that part of the pleadings in that case which this Court did not find was established by the evidence. Moreover, it appears from the opinion in that case that the facts were as follows:

> "There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and along side of the boiler-deck, and around the steam-chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton around the chimney extended from the boiler to within a foot of the upper deck.
>
> "The fire broke out in the cotton next the steam-chimney, between the two decks, at about half past seven o'clock in the evening, and was discovered before it had made much progress. *If the vessel had been stopped, a few buckets of water, in all probability, would have extinguished it. No effort seems to have been made to stop her, but, instead thereof, the wheel was put hard-a-port, for the purpose of heading her to the land.* In this act, one of the wheel-ropes parted, being either burnt or broken, in consequence of

> which the hands had no longer any control of the boat." (Italics ours.)

This Court did not find that the dangerous condition of the vessel could not have been remedied by the crew after sailing, such as would constitute unseaworthiness as defined by this Court in *International Navigation Co.* v. *Farr*, 181 U. S. 218, but in the italicized words in the quotation found just the contrary. To emphasize this finding, this Court said (6 How. 344, at pages 384 and 385):

> "It is, indeed, difficult, on studying the facts, to resist the conclusion, that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested."

We refer to page 33 of our main brief for what was said in this connection by the House of Lords in *Paterson, Zochonis & Co.* v. *Elder Dempster & Co.*, L. R. 1924 Appeal Cases 522, at page 548. In the *Lexington* case, even if the vessel should be considered unseaworthy, the damage complained of would not have happened but for the negligence of the ship's officers at sea in failing to remove the cargo and in failing to put out the fire with a few buckets of water, as should have been done. The uncontradicted evidence in the present case is that the seat of the fire could not be reached on the "Galileo" without shore assistance (R. 62).

Much reliance is placed on the *Walker* case by the respondent, but we have fully dealt with this case and the other cases relied on by the Circuit Court of Appeals in our principal brief. We note from respondent's brief that there is no attempt made to criticize the distinctions which we have drawn between the present case and the cases cited by the Circuit Court of Appeals in support of its opinion. Indeed counsel apparently accepts those distinctions by citing an entirely different set of cases (at page 29 of respondent's brief) to sustain the decision below.

At page 28 of respondent's brief, respondent says:

> "The petitioners, throughout all courts, including this one, have attempted to deal with this case as if the owner were relying on the Harter Act instead of on the Fire Statute."

Our brief may be searched from end to end without finding any support for this statement.

At page 31 of respondent's brief, respondent says:

> "The petitioners have printed in their brief long extracts from opinions in cases involving the Harter Act, without pointing out to the court the vital differences between the two statutes."

Only two cases quoted by us involved the Harter Act:

(1) *The Wildcroft*, 201 U. S. 378 (Petitioners' brief, page 27). Our main brief shows that the "Wildcroft" opinion was quoted to show the general duty of a ship-

owner imposed by maritime law. In our reply brief in the Circuit Court of Appeals we specifically called respondent's attention to the fact that the Harter Act imposed no duties, and that it merely limited the shipowner's right to contract and granted the shipowner certain exemptions subject to condition; and we further stated that it was the respondent and not ourselves who was confusing the Harter Act with the general duty imposed by maritime law.

(2) *The Carib Prince,* 170 U. S. 655 (see page 51 of petitioners' brief). In that case this Court took occasion to reiterate in strong terms what it had previously said in *The Caledonia,* 157 U. S. 124, which was not a Harter Act case, as to the shipowner's duty to make his ship seaworthy under the general maritime law. The quotation deals only with that statement by this Court. These quotations are short and in no way sustain respondent's statement.

Quinlan v. *Pew,* 56 Fed. 111, seems to be the case relied upon by respondent, but that case and the cases following it have long since been overruled, as was pointed out by Judge Hutcheson in *The Etna Maru,* 20 Fed. (2d) 143, by the decision of this Court in *Pendleton* v. *Benner Line,* 246 U. S. 353. Moreover *Quinlan* v. *Pew* did not even involve a contract of affreightment.

Moore v. *American Transportation Co.,* 24 How. 1, cited by respondent, did not deal in any sense with the question with which we are confronted here. That

case merely dealt with whether or not the Limitation Act of 1851 was applicable to vessels trading on the Great Lakes. The court made no attempt to decide any other question than that, and a careful reading of *Moore* v. *American Transportation Company* does not indicate that there was any question with respect to seaworthiness of the vessel on sailing.

Only two recent cases are cited in the long list of cases cited on page 29 of respondent's brief. They are *Kitsap County Transportation Co.* v. *Harvey,* 15 Fed. (2d) 166, and *American-Hawaiian S. S. Co.* v. *Pacific S. S. Co.,* 41 Fed. (2d) 718.

Kitsap County Transportation Co. v. *Harvey,* 15 Fed. (2d) 166, did not involve a contract of affreightment at all, but was a suit by a passenger for a personal injury, and the defendant shipowner was held liable for negligence.

American-Hawaiian S. S. Co. v. *Pacific S. S. Co.,* 41 Fed. (2d) 718, did not involve a contract of affreightment but was a case of collision between two steamers. No question of the liability of a common carrier in any aspect was involved.

Respondent's argument on pages 51 to 58 of its brief is wholly irrelevant, because it deals entirely with a question of waiver, which is not involved here at all, as we pointed out emphatically in our petition and brief for certiorari and in our reply brief in support of the petition for certiorari. In the present case petitioners make no claim of waiver, and notwith-

standing we clearly pointed this out in our petition and brief for certiorari, and in our reply brief in support of that petition in this court, counsel for respondent again devote pages of their brief to that irrelevant point. Under the circumstances we do not think their extended argument on that point merits further reply.

The *D'Utassy* case cited at page 52 of respondent's brief involved only a pleading alleging a "waiver," and is therefore entirely irrelevant. Furthermore the facts in the *D'Utassy* case (*D'Utassy* v. *Mallory Steamship Co.*, 162 A. D. 410), as stated by counsel for respondent are misleading. No question of unseaworthiness was involved in that case, and neither court makes any finding with reference to the lighter or vessel being unseaworthy or with reference to negligence of the vessel owner in connection with unseaworthiness. The case is wholly inapplicable to the present facts.

All that was decided in *D'Utassy* v. *Mallory Steamship Co.*, 162 A. D. 410, was:

> "The respondent relies on the last sentence quoted from said section 9, and contends that the effect thereof is to waive the Federal statutory exemption from liability for fire on a lighter in a harbor, occurring without its design or neglect, and to make the liability of a carrier by water for freight in such case governed by provisions of section 1 of the bill of lading." 162 A. D. at page 414.)
>
> "The appellant, on the other hand, contends that the only purpose of said sentence in section 9 was to make the liability of a carrier by rail for damages to freight on a lighter em-

ployed only incidentally in the course of its transportation the same as if the damages were caused while the freight was on a car, and thus to render its liability uniform throughout its transportation. That construction is indicated by the provision in section 3 which continues the carrier's liability as a railroad carrier even though it becomes necessary for it to carry by water; and I am of opinion that it is the proper construction of the bill of lading, and that it was not the intention of carriers by water to stipulate away their Federal statutory exemption from liability." (162 A. D. at page 415.)

Respondent labors for several pages (pages 31, 32, 33, 34) in its brief to maintain the position, taken by it and adopted by the Circuit Court of Appeals in its opinion, that *The Etna Maru,* 20 Fed. (2d) 143, affirmed 33 Fed. (2d) 232, was affirmed on a different ground from that upon which it was decided in the trial court. At the end of the discussion, however (near the top of page 34 of respondent's brief), it is forced to admit that our statement of the matter in our main brief (p. 19) is correct, and that all that the Circuit Court of Appeals for the Fifth Circuit did when it affirmed *The Etna Maru* decision was to hold that the Fire Statute was not applicable. The assumption elsewhere by respondent that the court decided that the Limitation Act did not apply is unfounded. All that the Circuit Court of Appeals for the Fifth Circuit said was (33 Fed. (2d) at p. 234):

"It is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted

to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against the ship."

The statements in the second paragraph on page 40 of respondent's brief are inaccurate. We have never suggested that the words "privity and knowledge" have been removed by judicial legislation. We have, in our main brief (at pp. 63 and 64), quoted at length from the opinion of Judge Addison Brown in *Gokey* v. *Fort*, 44 Fed. 364, at p. 366. Judge Brown there shows that the limitation statute has never had any application to a shipowner's "own personal obligation". It is respondent, not petitioners, who asks this Court to change the law. See *Lord* v. *Goodall*, 4 Sawyer 292. (See also petitioners' main brief, at page 41.)

The case of *Arkell & Douglass* v. *United States*, 13 Fed. (2d) 55, from which respondent quotes, obviously did not involve any warranty of seaworthiness because the negligent act was committed at Galveston, long after the vessel had left her loading port. We pointed this out at pages 44 and 45 of our main brief.

We have reviewed in our main brief the other cases cited in respondent's brief (see petitioners' brief, pages 34 to 40).

A tabulation appears on page 43 of respondent's brief, evidently for the purpose of suggesting that our statement that most of the cargo was carried under bill

of lading Form A is incorrect. That our statement is correct is established by the fact that the list or statement of shipments annexed to the libel shows that all of the grain cargo was carried under Form A (R. 50A). See also Libellants' Exhibit 13 (R. 542B), stowage plan, which shows the lower holds of the ship filled with the grain (about 140,000 bushels) all of which was carried under that Form A. Numerous other lots of cargo were also carried under the Form A bill of lading. It was stipulated by the parties (R. 555) that the statement or list of shipments annexed to the libel as an exhibit (at R. 50A) listing the cargo shipped on the S. S. "Galileo" is correct, excepting the items noted in the stipulation. In referring to Earle & Stoddart and Sanday & Co. in our brief below we relied on this stipulation, and merely mentioned these two typical shippers of cargo under bill of lading Form A to avoid burdening the Court with unnecessary detail.

At page 13 of respondent's brief it is stated that

> "The petitioners did not contend in the District Court that any of the bills of lading were 'personal' contracts." (R. 591.)

But see R. 590, where the District Court, in its opinion states that the petitioners did make such contention as follows:

> "Libellant's contention that respondent is liable for the loss, even though it was caused solely by the negligence of the chief engineer, is based on the theory that *respondent was under*

> *a contractual obligation to the shippers* that reasonable care be exercised by all concerned to make the vessel seaworthy before she left port. It is not contended that the doctrine of *respondeat superior* makes respondent liable, but that the negligence of the chief engineer *caused a breach of contract on the part of the owner.*" (Italics ours.)

And see the opinion of the Circuit Court of Appeals (R. 647) that

> "It is urged that the bills of lading issued to Earle & Stoddart, Inc. and to Sanday & Co. *were the personal contracts of the respondent to which the limitation acts do not apply.*" (Italics ours.)

Again at page 9 of respondent's brief it is said:

> "The petitioners made no claim in the District Court that the bills of lading constituted 'personal' contracts containing 'an express warranty of seaworthiness'."

The fact is that in the petitioners' brief in the District Court, that claim was made as follows:

> "There was a contractual warranty by the respondent in each of these bills of lading that it would in fact use due diligence at New York to make the 'Galileo' seaworthy before sailing on this particular voyage. The language selected and used by the respondent itself in its printed bills of lading (which are annexed as exhibits to the libel) is that:
>
> [The bill of lading clause is then quoted.]
>
> "We call the especial attention of the court to the following part of the clause which we

just quoted: 'It is mutually agreed that * * * the carrier shall not be liable as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after or during or while waiting, loading * * * by * * * unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, *provided the owners have exercised due diligence to make the steamer seaworthy.*' (Italics ours.) The Supreme Court of the United States and the other Federal courts have repeatedly held that such a contractual warranty by a shipowner that he will actually use due diligence to make a vessel seaworthy before sailing, cannot be delegated by the shipowner to any one else; it must actually be complied with or else the shipowner has breached his contract. [Citing numerous cases.] Moreover, the bills of lading are signed by agents of the respondent (Ellerman's Wilson Line, Ltd. by Ellerman's Wilson Line, New York, Inc., as Agent) so that the contract is a personal one by the respondent, a breach of which is a breach of a shipowner's personal contract constituting 'neglect' of the shipowner personally, as that term is used in the Fire Statute. A recent case on this point reviewing the decision of the Supreme Court of the United States, is *The Etna Maru*, 1927, American Maritime Cases, 1142, 1146, 1148, (affd. 1929 A. M. C. 1119—C. C. A. 5; certiorari denied, U. S. Sup. Ct., October Term 1929), in which the United States District Court for the Southern District of Texas said:"

[Extensive quotation is then made from the opinion in the *Etna Maru* case, including quo-

tations from the decisions in *Benner Line* v. *Pendleton* and in *The Caledonia,* 157 U. S. 124.]

Again in petitioners' brief in the District Court it was claimed:

> "The contract was a personal one of the respondent; and it is, therefore, at fault personally for the breach of it, under the decisions in *Benner Line* v. *Pendleton, The Poleric* and *The Etna Maru,* irrespective of whether or not it personally committed any act in connection with the breach."

Indeed, both courts below discussed *The Etna Maru,* 20 Fed. (2d) 143 and *The Etna Maru,* 33 Fed. (2d) 232, cited in our briefs in the respective courts. The chief authority relied upon in *The Etna Maru,* 20 Fed. (2d) 143, was *Pendleton* v. *Benner Line,* and one of the chief authorities relied upon by the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. (2d) 232, was *Luckenbach* v. *McCahan Sugar Co.,* 248 U. S. 139. The ground of conflict between the two circuits which exists as a result of the decision of the court below in the present case necessarily involves a repudiation of the statement contained in respondent's brief and of the doctrine announced by this Court in *Pendleton* v. *Benner Line* and in *Luckenbach* v. *McCahan Sugar Co.*

The statement at page 12 of respondent's brief that

> "Petitioners' attempt to invoke here for the first time the doctrine laid down in *Pendleton*

v. *Benner Line*, 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139"

is incorrect, not only because of the foregoing quotation from petitioners' brief in the District Court, but also because the petitioners made the further claim in their printed brief in the Circuit Court of Appeals as follows:

> "POINT V. The failure of respondent to deliver some of the goods lost and damaged on the 'Galileo' was a breach of a personal contract; to the liability so created the statutes do not apply. * * * In so far as the Earle & Stoddart shipments and the Sunday shipments are concerned, however, the statutes can have no application because the liability of the shipowner rests upon personal contract. These bills of lading are all signed 'Ellerman's Wilson, Line, Ltd., by Ellerman's Wilson Line, Inc.,' its 100% owned subsidiary, such bills constituting a personal contract. See *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139. In that case, at page 149, the court said:
>
> 'But the liability of the owners sought to be enforced here is one resting upon their personal contract; to such liability limitation acts do not apply.'
>
> The liability therefore of the shipowner for these shipments cannot be disputed in any event.
>
> POINT VI. Libellant's losses were in consequence of unseaworthiness, and as the bill of lading provided that respondent should be liable for unseaworthiness where it failed to use due diligence to make the ship seaworthy, the respondent, when it failed in that respect, breached

his contract and *ipso facto* became liable because libellant's losses were caused by unseaworthiness and not by fire. * * * In order to hold that the provision exempts the shipowner from liability for unseaworthiness when a fire intervenes, the court must hold that a shipowner is under no obligation to make his ship seaworthy in respect to a fire. In the instant case the shipowner has expressly agreed to be liable, without reservation, for losses due to unseaworthiness, even when a fire intervenes. * * * Indeed, no other conclusion is possible under the decisions of the Supreme Court in the *G. R. Booth*, and in the *Malcolm Baxter, Jr., supra*. Moreover, it is well settled here 'that the obligation to furnish a seaworthy vessel should not be held to be contracted away by implications'. *The Caledonia*, 157 U. S. 124. Especially is this true when the shipowner in its own contract has differentiated between losses caused by fire and losses caused by unseaworthiness. See bill of lading clause (appendix 3) where loss from fire and loss from unseaworthiness are dealt with separately."

Respectfully submitted,

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel for Petitioners.

FILE COPY

APR 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 20

EARLE & STODDART, INC., *et als.*, Owners of Cargo on the Steamship *Galileo*,

Petitioners,

against

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship *Galileo*,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLAYTON KNATING,
Counsel for Respondent.

Terminal Printing Inc., 49 Thomas St., New York, N. Y. A.

INDEX.

PAGE

STATEMENT 1

FIRST POINT:

Section 1 of the Limited Liability Act of March 3, 1851, Commonly Known as the "Fire Statute", Constitutes a Complete Defense to the Owner of the *Galileo* for the Negligence of the Chief Engineer in Causing the Fire on the *Galileo* 4

SECOND POINT:

The Owner of the *Galileo* did not by the Terms of the Bills of Lading Waive the Benefits of the Limited Liability Act of March 3, 1851 13

LAST POINT:

The Petition for Writ of Certiorari Should be Denied 15

Table of Cases.

	PAGE
American Hawaiian S. S. Co. *vs.* Pacific S. S. Co., 41 F. (2d) 718	10
Annie Faxon, The, 75 Fed. 312	10
Arkell & Douglass *vs.* U. S., 13 F. (2d) 555	8
Bank Line *v.* Porter, 25 F. (2d) 843, 17 F. (2d) 513	8
Charbonnier *v.* United States, 45 F. (2d) 166, 174	8
Colima, The, 82 Fed. 665	10
Craig *vs.* Continental Insurance Co., 141 U. S. 638	8, 10
Christopher *vs.* Gruby, 40 F. (2d) 8	9
Elizabeth Dantzler, The, 263 Fed. 596	9
Erie Lighter 108, The, 250 Fed. 490	10
Etna Maru, The, 20 F. (2d) 143, 33 F. (2d) 232	11, 13
Hines *vs.* Butler, 278 Fed. 877	9, 10
Ingram & Royle *vs.* Services Maritime du Treport (1914), 1 K. B. 541	9
Jane Gray, The, 99 Fed. 582	10
Keene *vs. The Whistler,* Fed. Cases No. 7645	8
Kitsap County T. Co. *vs.* Harvey, 15 F. (2d) 166	10
Malcolm Baxter, Jr., The, 277 U. S. 323	11
Norwich Company *vs.* Wright, 80 U. S. 104	8
Patten-Tulley T. Co. *vs.* Turner, 269 Fed. 334	10
Pocomoke Guano Co. *vs.* Eastern T. Co., 278 Fed. 745, 285 Fed. 7	10
Providence & N. Y. S. S. Co. *vs.* Hill Mfg. Co., 109 U. S. 578	8

PAGE

Quinlan *vs.* Pew, 56 Fed. 111 10

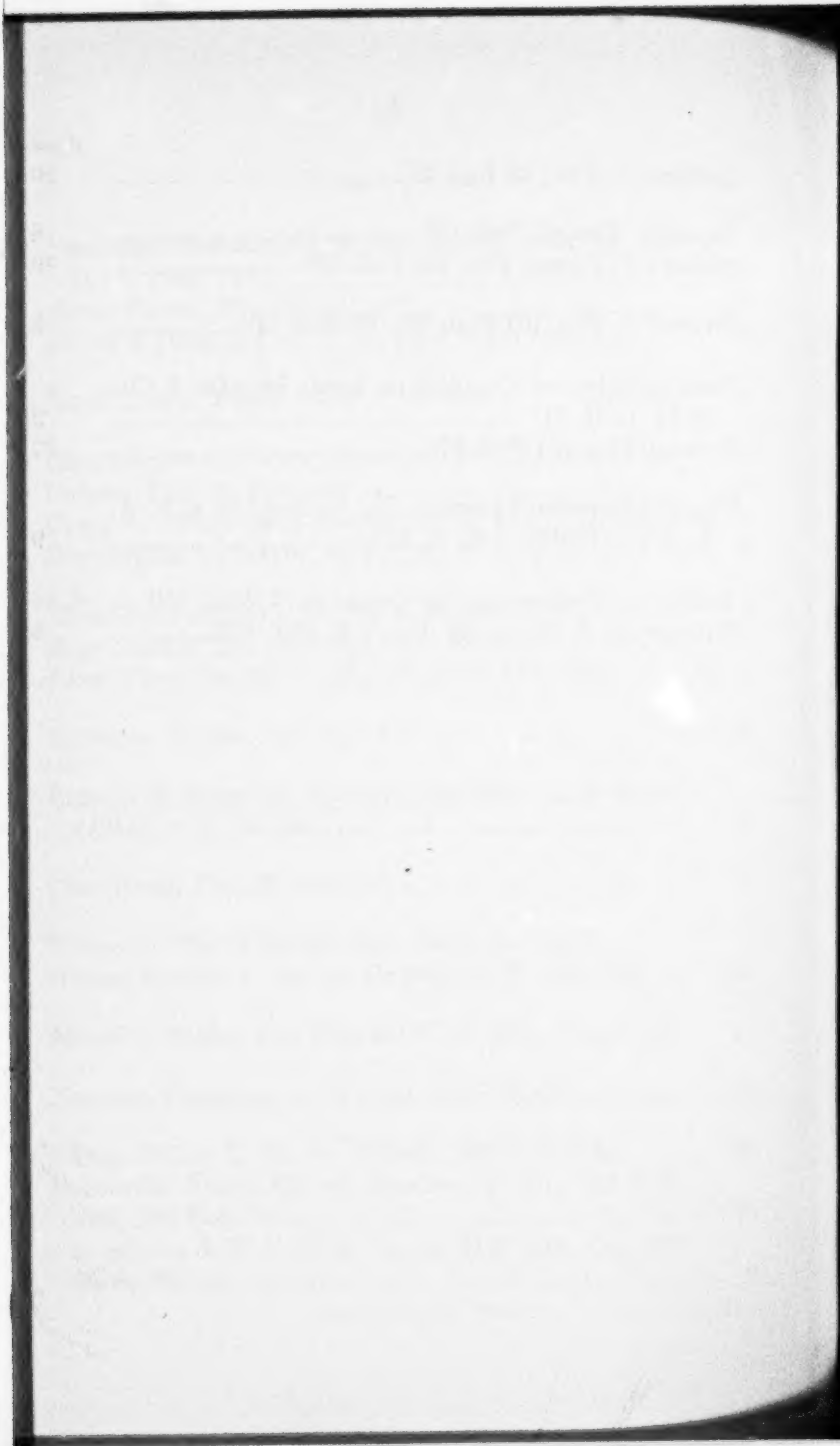
Republic, The, 61 Fed. 109 8
Richard F. Young, The, 245 Fed. 499 10

Strathdon, The, 101 Fed. 600, 89 Fed. 374 8

Tempus Shipping Co., Ltd. *vs.* Louis Dreyfus & Co., 40 Ll. L. R. 217 9
Tommy, The, 151 Fed. 570 10

Virginia-Caroline Chemical Co. *vs.* Norfolk & N. A. S. S. Co. (1912), 1 K. B. 229 9

Walker *vs.* Transportation Company, 3 Wall. 150 ..... 6, 14
Williams S. S. Co. *vs.* Wilbur, 9 F. (2d) 622 8



IN THE

Supreme Court of the United States

EARLE & STODDART, INC., *et als.*, Owners of Cargo on the Steamship *Galileo*, Petitioners, *against* ELLERMAN'S WILSON LINE, LTD., Owner of Steamship *Galileo*, Respondent.	October Term, 1931. No. 809.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The opinion of the District Court [S. D. N. Y., Coleman, J.] is reported in 45 F. (2d) 231. The opinion of the Circuit Court of Appeals [C. C. A. 2, Swan, J.] is reported in 54 F. (2d) 913.

Both Courts below made the following concurrent findings of fact and conclusions of law:

1. That the fire which caused the loss of the S.S. *Galileo* and her cargo was entirely due to the negligence of her Chief Engineer in loading a new supply of coal on the coal remaining in the ship's bunkers, which was "heated". It is uncontradicted that the inspection and care of coal involve merely usual and simple duties of a Chief Engineer.

2. That the owner of the *Galileo* had not been guilty of any fault or neglect whatsoever.

3. That the Fire Statute (R. S. 4282, U. S. Code, Title 46, Sec. 182) constituted a complete defense to the owner for the fire, solely caused by the negligence of the Chief Engineer of the *Galileo*.

4. That the owner of the *Galileo* had not waived the Fire Statute by any contract or warranty contained in the bills of lading, but, on the contrary, had expressly contracted that the shipment was subject to the terms of the Fire Statute (R. S. 4282).

On page 3 of the Petition the following statement appears:

> "This defense [Fire Statute] was sustained notwithstanding the circumstance that the shipowner by personal written contract had warranted that 'the owners' (R., p. 698) of the vessel would exercise due diligence to make her seaworthy at the time she was sent to sea from the loading port."

The foregoing quotation is a complete misstatement of the record. Both Courts below made an express finding to the contrary, each Court pointing out that the owner had not waived the Fire Statute by the terms of the bills of lading (R., pp. 740, 790) and had not contracted themselves into a greater and unlimited liability.

The substance of the foregoing quotation, in varying form, is repeated many times in the Petition and accompanying Brief. In view of the findings of both Courts below, we submit, such a statement is wholly unjustifiable. The alleged quotation from the bills of lading on page 4 of Petitioners' Brief is a distortion of the exceptions clause appearing in the bills of lading.

The Petitioners have cited a large number of cases, covering a wide range of legal subjects, which they claim are in conflict with the decisions below, but in a simple case involving the construction of a Federal Statute they do not even quote the terms of the Statute.

We will show that none of these alleged claims of conflict exist in fact.

Obviously, cases which do not involve either the Fire Section or any other section of the Limited Liability Act of March 3, 1851 (U. S. Code, Title 46, Secs. 182-187) have no bearing on the present case, which depended on the language of that particular statute. Similarly, cases which do involve the Fire Section or other sections of the Limited Liability Act of 1851 have no relevancy where the owner was found guilty of fault and neglect, or of privity and knowledge.

In the case at bar both Courts below found that the accident was due solely to the negligence of the Chief Engineer and that the owner was not guilty of any fault or neglect.

In the eighty years since the Limited Liability Act became law not a single case has imposed liability on a shipowner under such circumstances.

FIRST POINT.

SECTION 1 OF THE LIMITED LIABILITY ACT OF MARCH 3, 1851, COMMONLY KNOWN AS THE "FIRE STATUTE", CONSTITUTES A COMPLETE DEFENSE TO THE OWNER OF THE *Galileo* FOR THE NEGLIGENCE OF THE CHIEF ENGINEER IN CAUSING THE FIRE ON THE *Galileo*.

The Limited Liability Act of March 3, 1851 (c. 43, 9 Stat. 635), as amended, comprising in all six sections, will be found in U. S. Code, Title 46, as Sections 182 to 187, inclusive. Section I (the so-called Fire Statute) and Sections III and VI of the Limited Liability Act of March 3, 1851, read as follows (italics ours):

> "*Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, *unless such fire is caused by the design or neglect of such owner.*" 46 U. S. C., s. 182.
>
> "*Liability of owner not to exceed interest.* The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred *without the privity, or knowledge of such owner or owners,* shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U. S. C., s. 183.
>
> "*Remedies reserved.* Nothing in the five preceding sections shall be construed to take away or affect

> the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." 46 U. S. C., s. 187.

It will be observed that the Limited Liability Act of March 3, 1851, did three things:

> First. It relieved the shipowner entirely for a loss happening to or on board a vessel by fire *"unless such fire is caused by the design or neglect of such owner."*
>
> Second. It conferred upon a shipowner the right in any event to limit his liability for any loss occurring *without his privity and knowledge* to the value of his interest in the vessel and her pending freight after an accident.
>
> Third. It reserved to those suffering injury or damage the right to proceed against the master, officers or seamen whose negligence caused the loss.

In other words, the Limited Liability Act of March 3, 1851, relieved the shipowner from the consequences of imputable negligence for losses due to fire, and permitted him, in any event, to limit his liability if the loss was caused without his privity and knowledge.

That the foregoing is a correct and uniform statement of the Statute is supported by a long list of authorities dating back to the time of its enactment.

In *Walker* vs. *Transportation Company*, 3 Wall. 150, a cargo of grain owned by Walker & Co. was shipped on a vessel belonging to the Transportation Company, a common carrier. The vessel caught fire through the negligence of some of her officers and the grain was burned up. Walker & Co. accordingly filed a libel to recover the value of the wheat. The defendant contended that while the wheat was destroyed by fire, the fire was not caused by the "design or neglect" of the shipowner and that he was not liable under the Fire Statute. This defense was excepted to. The exception was overruled. The case was appealed first to the Circuit Court, where evidence was taken which showed the fire was caused by the negligence of the officers of the steamer, and then to the Supreme Court.

The Supreme Court affirmed the decrees below and held that the shipowner was not responsible under the Limited Liability Act of 1851 for a fire caused by the negligence of the master and officers of the vessel, in whose misconduct the owner did not participate personally.

The opinion of the Supreme Court in this case does not show where the fire occurred or what the negligence of the officers was which caused the fire. We have, however, examined the record filed in the office of the Clerk of the Supreme Court. This record shows that at the time the fire occurred, the vessel, after having loaded the libelant's cargo at one pier, had shifted to another pier in the Chicago River, where she was lying at the time of the fire, preparatory to taking on additional cargo before starting on her voyage to Buffalo. The cause of the fire was that, contrary to the necessities of the time, the officers of the ship negligently failed to wet down the fire in the boiler room at night and all went to bed, leaving the vessel unattended. The fire took place owing to the negligent failure of the officers to

wet down the fires and in leaving the vessel with a dangerous fire on board with no one on watch.

The situation presented is identical with the *Galileo*. Obviously the crew in the *Walker* case had not exercised "due diligence".

At page 153 the Court said in the *Walker* case:

> "It is quite evident that the statute intended to modify the shipowner's common-law liability for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect.
>
> "By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.
>
> "When we consider that the object of the act is to limit the liability of *owners* of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.
>
> "If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section, which, in terms, saves the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

"We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally."

See also:

Craig v. *Continental Insurance Co.*, 141 U. S. 638;

Keene v. *The Whistler*, Fed. Case No. 7645 (D. C. Cal.);

The Strathdon, 89 Fed. 374 (D. C. N. Y.);

The Strathdon, 94 Fed. 206; affirmed 101 Fed. 600 (C. C. A. 2);

Norwich Company v. *Wright*, 80 U. S. 104, 117;

Providence & N. Y. S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589;

The Republic, 61 Fed. 109, 112 (C. C. A. 2).

In fact, in all cases which we have been able to find where exoneration from liability under the Fire Statute has been denied, there has been proof that the fire was due to the negligence of the owner himself or of some representatives of the owner other than the ship's officers and crew.

Arkell & Douglas v. *United States*, 13 F. (2d) 555 (C. C. A. 2);

Bank Line v. *Porter*, 25 F. (2d) 843 (C. C. A. 4);

Charbonnier v. *United States*, 45 F. (2d) 166 (E. D. S. C.), affirmed in 45 F. (2d) 174 (C. C. A. 4);

Williams S. S. Co. v. *Wilbur*, 9 F. (2d) 622 (C. C. A. 9);

Christopher v. *Grueby*, 40 F. (2d) 8 (C. C. A. 1);
Hines v. *Butler*, 278 Fed. 877 (C. C. A. 4);
The Elizabeth Dantzler, 263 Fed. 596 (E. D. Va.).

Our Fire Statute was taken from an earlier British Act (26 Geo. III, c. 86), as was pointed out in *Norwich Insurance Company* v. *Wright*, 80 U. S. 104, 117. The present British Statute, 57 and 58 Vict., c. 60, sec. 502, par. (i), is practically identical with our own. It reads:

> "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:
>
> (i) Where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

It is well settled under British law that a shipowner does not lose exemption from liability for loss by fire because the ship's officers have failed to exercise due diligence to make the vessel seaworthy when her voyage starts. *Virginia-Carolina Chemical Co.* v. *Norfolk & North Am. S. S. Co.* [1912], 1 K. B. 229; *Ingram & Royle* v. *Services Maritimes du Treport* [1914], 1 K. B. 541; *Tempus Shipping Co.* v. *Louis Dreyfus & Co.*, 40 Lloyd's L. L. 217, 219.

The English Courts, as well as the Courts below, declined to legislate into the statutes the additional exception not found in the statutes that "due diligence to make the vessel seaworthy must be used by the ship's officers".

The difference between the Limited Liability Act and the Harter Act, which does require "due diligence" as a

condition precedent to its benefits, is succinctly pointed out by Judge Swan below. R., p. 787.

The Petitioners' position, in short, is that the owner of a vessel, who has been guilty of no fault or neglect, is not relieved from liability for a fire unless all the ship's officers have exercised due diligence to make the vessel seaworthy on sailing, and, similarly, an owner cannot limit his liability to the value of the ship and freight following a disaster, *even though he is without privity and knowledge,* unless the ship's officers have exercised due diligence to make the vessel seaworthy on sailing. This extraordinary proposition is, of course, contrary to countless decisions of this Court and of the Courts of other circuits.

Quinlan v. *Pew,* 56 Fed. 111 (C. C. A. 1);
The Annie Faxon, 75 Fed. 312 (C. C. A. 9);
La Bourgogne, 210 U. S. 95;
The Colima, 82 Fed. 665 (S. D. N. Y.);
The Jane Gray, 99 Fed. 582 (D. C. Wash.);
The Tommy, 151 Fed. 570 (C. C. A. 2);
The Richard F. Young, 245 Fed. 499 (E. D. Va.);
The Erie Lighter 108, 250 Fed. 490 (D. C. N. J.);
Patton-Tulley Transportation Co. v. *Turner,* 269 Fed. 334 (C. C. A. 6);
Hines v. *Butler,* 278 Fed. 877, affirming 264 Fed. 986 (C. C. A. 4);
Pocomoke Guano Co. v. *Eastern Trans. Co.,* 278 Fed. 745 (D. C. Md.), affirmed 285 Fed. 7 (C. C. A. 4);
Kitsap County Transportation Co. v. *Harvey,* 15 F. (2d) 166 (C. C. A. 9);
Craig v. *Continental Ins. Co.,* 141 U. S. 638;
American-Hawaiian S. S. Co. v. *Pacific S. S. Co.,* 41 F. (2d) 718 (C. C. A. 9).

Contrary to the assertion of the Petitioners, the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, is not in conflict with any of the authorities above cited. As pointed out by Judge Swan in his opinion below, the owners of the *Malcolm Baxter, Jr.*, were *guilty of "privity and knowledge"* in connection with the unseaworthiness of the *Baxter* and for this reason were properly denied limitation of liability. Here concededly the owner was neither at fault nor guilty of privity and knowledge. The distinction between the innocence of the owner of the *Galileo* and the guilt of the owner of the *Baxter* is vital.

The only case which in any way supports the Petitioners' contention with respect to the Limited Liability Act of March 3, 1851, is the District Court's decision in *The Etna Maru*, 20 F. (2d) 143 (D. C. Texas), affirmed on another and wholly different ground in 33 F. (2d) 232.

That was a libel *in rem* by the cargo interests against the steamer *Etna Maru*. In the District Court it appeared that the owners of the steamer had made a personal contract in the form of a charter party containing an express warranty of seaworthiness by the owner. It further appeared that there was a *physical defect in the steamer itself*, which made the steamer unseaworthy and which had been directly responsible for a fire.

The case was tried before Judge Hutcheson in the Southern District of Texas.

The District Court held that the owners had a nondelegable duty of furnishing a seaworthy ship, both by an express contract and as a matter of general law. The express contract of the owner was enough to dispose of the case because he contracted himself out of the statute.

But disregarding all authorities on the subject of the Limited Liability Act of 1851, including many decisions of

this Court, the District Court delivered the following *dictum* with respect to the Limited Liability Act, R. S. 4282-4287:

> "That the right to limitation or exemption is to be sought in the whole text of the acts [R. S. 4282-4287] and that they plainly mean to say that the owner may have limitation or protection against the acts of the officers of the ship, the master, and of the crew, who are in charge of and navigating his ship on her voyage, but that the owner is responsible for the proper discharge of those duties with reference to seaworthiness before the beginning of a voyage, which are properly chargeable as non-delegable duties to the owner, whether he undertakes personally to discharge them or delegates them to others."

This view of the law, of course, would deprive any shipowner of the right to limit liability even where he had been guilty of no privity or knowledge, if the ship was unseaworthy and due diligence had not been exercised by some of the crew to make her seaworthy.

Such is not the law by overwhelming authority. The exact contrary has been held by this Court in many cases. See the cases cited on pages eight and ten of this brief.

The case of the *Etna Maru* was appealed to the Circuit Court of Appeals for the Fifth Circuit, 33 F. (2d) 232, where the Court reached the decision that the Limited Liability Act of 1851 did not apply at all, because the action was *in rem* against the steamer and not *in personam* against the owners. The Court thought that the Limited Liability Act of 1851 only relieved the owners personally, and not the ships.

The District Court was affirmed, therefore, on another and wholly different ground, to-wit: that the Limited Lia-

bility Act of 1851 has no application to actions *in rem*, but only to actions *in personam*.

There is no such point involved in the present case, and hence there is no conflict whatsoever between the decisions below and the decision of the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232.

SECOND POINT.

THE OWNER OF THE *Galileo* DID NOT BY THE TERMS OF THE BILLS OF LADING WAIVE THE BENEFITS OF THE LIMITED LIABILITY ACT OF MARCH 3, 1851.

In both Courts below Petitioners argued at great length that the owner of the *Galileo* by the terms of the bills of lading waived the benefits of the Limited Liability Act of March 3, 1851, and contracted themselves into a greater and unlimited liability. This question obviously involved merely a matter of simple contract construction. It was decided adversely to the Petitioners in both courts. The Petitioners have thus had their day in two courts on a simple contract question of no importance except to the litigants engaged here.

There were eighteen forms of bills of lading covering the merchandise mentioned in the libel. Nine of the eighteen bills of lading contained the following clause:

> "This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

In the other nine bills of lading the clause read as follows:

> "IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of, and all

> the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes."

R. S. 4282-4287 comprise the Limited Liability Act of March 3, 1851. R. S. 4282, which is expressly incorporated in all forms of the bills of lading in this case is the Fire Section quoted at page four of this brief.

The precise meaning and effect of R. S. 4282 has been determined by this Court in *Walker* v. *Transportation Co.*, 3 Wall. 150.

Instead, therefore, of the owner in this case having waived the benefits of the Fire Section of the Limited Liability Act, and contracted himself into a greater liability, the shipowner has made an express contract that he shall have the benefit of the Fire Statute.

It must be borne in mind that the Petitioners contended under this point that the shipowner made a special contract in the bills of lading waiving the provisions of Sections 4281 to 4287, inclusive, of the Revised Statutes and that the shipowner has by special contract in the bills of lading agreed that he should not have the benefit of the exemptions contained in the Limited Liability Act, including, of course, the right to limit liability.

In the light of the terms of the bills of lading giving the shipowner the right to all exemptions from liability contained in Sections 4282-4287 of the United States Revised Statutes, it is a little difficult to understand how it can be seriously argued that the shipowner has made a special contract expressly waiving the provisions of Section 4282 and has agreed to a greater and unlimited liability.

At any rate, this point involves merely a matter of construction of a contract of no special public importance, which has been decided adversely to the Petitioners in two Courts.

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

CLETUS KEATING,
Counsel for Respondent.

Dated: New York, March 31, 1932.

FILE COPY

OCT 18 1932

CHARLES ELMORE CR
CLE

IN THE

Supreme Court of the United States

No. 20—October Term, 1932.

EARLE & STODDART, INC., *et al.*,
Petitioners,

against

ELLERMAN'S WILSON LINE, LTD., Owner and Operator of the Steamship *Galileo*,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

Clayton Keating,
L. De Grove Potter,
James H. Hemmens,
Richard L. Sullivan,
Counsel for Respondent.

Rumsey Printing Corp., 80 Thompson St., New York, N. Y.

INDEX.

PAGE

Citation of Decisions Below 1

Statement of the Case 1

Statement of Facts 3

Opinions of the Courts Below 6

Contentions of the Petitioner 7

Summary of Argument 8

First Point:

Section I of the Limited Liability Act of March 3, 1851 as amended, commonly known as the "Fire Statute", constitutes a complete defense to the owners of the *Galileo* for the negligence of Chief Engineer Oxtoby 15

1. History of the Fire Statute 17
2. Decisions of this Court 21–26
3. There is a vital difference between the Fire Statute and the later legislation known as the Harter Act 26
4. The American Fire Statute is modeled after the British Fire Statute and is wholly unlike the Canadian Carriage of Goods Act 34
5. The decision in *The Malcolm Baxter, Jr.*, 277 U. S. 323 37

PAGE

SECOND POINT:

The Respondent did not make any "personal" or other contract with the Petitioners containing an express warranty of seaworthiness and did not waive the Fire Statute or contract itself into an unlimited liability 42

1. The Respondent made no "personal" contract with the Petitioners. Respondent had no "managing agent" at New York 42

2. The bills of lading did not contain any express warranty of seaworthiness, did not waive the Fire Statute, and did not constitute a contract by the owner to assume unlimited liabilities 45

CONCLUSION 59

LAST POINT:

The decree of the Circuit Court of Appeals for the Second Circuit should be affirmed 59

APPENDIX

A. Quotation from Petitioners' Brief in the Circuit Court of Appeals 60

B. Bill of Lading Clauses incorporating the Fire Statute 61

C. Canadian Water-Carriage of Goods Act 63

Authorities.

	PAGE
American Hawaiian S. S. Co. v. *Pacific S. S. Co.*, 41 F. (2d) 718	29
Annie Faxon, The, 75 Fed. 312	29
Arkell & Douglass v. *United States*, 13 F. (2d) 555	40
Bank Line v. *Porter*, 17 F. (2d) 513; 25 F. (2d) 843	40, 52
Capitol Transp. Co. v. *Cambria Steel Co.*, 249 U. S. 334	13, 45
Charbonnier v. *United States*, 45 F. (2d) 166, 174	41
Colima, The, 82 Fed. 665	29
Corporation of the Royal Exchange Assurance v. *Kingsley Nav. Co.*, 1923 A. C. 235	36
Craig v. *Continental Ins. Co.*, 141 U. S. 638	10, 22, 29, 41
Louis Dreyfus & Co. v. *Tempus Shipping Co.*, 1931 A. C. 726	35
D'Utassy v. *Mallory Steamship Co.*, 162 A. D. 410, 223 N. Y. 592	52
Elizabeth Dantzler, The, 263 Fed. 596	40
Erie Lighter 108, The, 250 Fed. 490	29
Etna Maru, The, 20 F. (2d) 143, 33 F. (2d) 232	31
Galileo, The, 45 F. (2d) 231, 54 F. (2d) 913	1
Hines v. *Butler*, 278 Fed. 877, 264 Fed. 986	29, 30
Hoffmans, The, 171 Fed. 455	54, 56
Houston Nav. Co. v. *Ins. Co.*, 89 Tex. 1	54
Ingram & Royle v. *Services Maritimes du Treport* (1914), 1 K. B. 541	29, 35, 56
Jane Gray, The, 99 Fed. 582	29
Keene v. *The Whistler*, Fed. Cases No. 7645	22
Kitsap County Transp. Co. v. *Harvey*, 15 F. (2d) 166	29

PAGE

Liverpool, etc., Nav. Co. v. *Brooklyn Terminal*, 251 U. S. 48 34
Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139 ..... 12, 44, 45

Malcolm Baxter, Jr., The, 277 U. S. 323 ..... 12, 37, 38, 39
Matter of Old Dominion S. S. Co., 115 Fed. 845 54
Moore et al. v. *American Transp. Co.*, 24 How. 1, 10, 17, 19, 21, 29, 35
Matter of New York, L. & W. R. R. Co., 98 N. Y. 447 53

New Jersey Steam Nav. Co. v. *Merchants Bank*, 6 How. 344 ..... 17, 18, 19
Norwich Co. v. *Wright*, 80 U. S. 104 ..... 10, 22

Patten-Tully Transp. Co. v. *Turner*, 269 Fed. 334 29
Pendleton v. *Benner Line*, 246 U. S. 353 ..... 12, 44, 45
Pocomoke Guano Co. v. *Eastern Transp. Co.*, 278 Fed. 745, 285 Fed. 7 29
Poleric, The, 17 F. (2d) 513, 25 F. (2d) 843 ..... 40, 52
Providence & N. Y. S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578 ..... 10, 23, 54

Queen Ins. Co. v. *Globe & Rutgers Co.*, 263 U. S. 487 35
Quinlan v. *Pew*, 56 Fed. 111 29

Republic, The, 61 Fed. 109 24
Richard F. Young, The, 245 Fed. 499 29
Richardson v. *Harmon*, 222 U. S. 96 53
Royal Exchange Assurance v. *Kingsley Nav. Co.*, 1923 A. C. 235 36

Salvore, The, 52 F. (2d) 278 45
Spencer Kellogg Co. v. *Hicks*, 285 U. S. 502 40
Strathdon, The, 101 Fed. 600, 89 Fed. 374 ..... 25, 55
St. Cuthbert, The, 97 Fed. 340 54
Successors De Esmoris & Co. v. *Whitney & Bodden Co.*, 39 F. (2d) 191 44

PAGE

Tempus Shipping Co. v. *Dreyfus & Co.*, 1931 A. C. 726 35

Tommy, The, 151 Fed. 570..... 29

Virginia-Carolina Chemical Co. v. *Norfolk Co.* (1912) 1 K. B. 229.....35, 53, 54

Walker v. *Transportation Co.*, 3 Wall. 150, 10, 19, 21, 22, 26, 48, 51, 59

Willfaro-Willsolo, 9 F. (2d) 622..... 41

Yungay, The, 58 F. (2d) 352..... 45

STATUTES INVOLVED.

British Fire Statute..... 34

Canadian Carriage of Goods by Sea Act.....35, Appendix B

Fire Statute..... 15

Harter Act..... 26

Limited Liability Act of March 3, 1851..... 15

IN THE

Supreme Court of the United States

No. 20—October Term, 1932.

Earle & Stoddart, Inc., *et al.*,
Petitioners,

against

Ellerman's Wilson Line, Ltd.,
Owner and Operator of the Steamship *Galileo*,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

The case is reported below in the District Court as *Earle & Stoddart* vs. *Ellerman's Wilson Line*, 45 F. (2d) 231, R. 582, and in the Circuit Court of Appeals, 54 F. (2d) 913, R. 641.

Statement of the Case.

A libel *in personam* was filed in the United States District Court for the Southern District of New York against the owner of the S.S. *Galileo* by 136 cargo owners to re-

cover $650,000 for loss and damage to merchandise which occurred by reason or by means of a fire happening on the Steamship *Galileo* in August, 1926. The seriousness of the fire was discovered shortly after the voyage from New York to Hull began. Thereafter the steamer returned to New York and became a total loss with her cargo when the vessel sank in New York harbor as a result of the fire and the water used in an effort to extinguish the fire.

The parties agreed that the fire was the proximate cause of the loss, and the Courts below so found. R. 642.

The cause of the fire, which started in a temporary coal bunker in #3 'tween deck, as both Courts below concurrently found, was clearly shown to have been the negligence of Chief Engineer Oxtoby of the *Galileo* in failing to remove coal in #3 'tween deck bunker which had become heated from spontaneous combustion, and in loading, after due warning of the actual situation, further coal on top of the heated coals in the bunker. R. 307-309, 313-316, 326, 328-334.

The evidence showed, and both Courts below concurrently found, that no other member of the ship's personnel or any shore representative of the Respondent, or the Respondent itself, participated in or had any knowledge whatsoever of this negligence. R. 308.

Oxtoby was solely to blame and his negligence was the proximate cause of the fire.

Oxtoby's actions involved a failure in respect to a simple and usual duty of a chief engineer in a situation practically identical with that which existed in *Walker* v. *Transportation Co.*, 3 Wall. 150.

Because all the issues of fact litigated below were decided in Respondent's favor, the libels were dismissed.

Statement of Facts.

The *Galileo* was a steel general cargo steamer of the shelter deck type, of 6,300 tons gross and 4,090 tons net register. R. 208. So far as her physical condition was concerned, she was in all respects seaworthy and properly manned, equipped and supplied, and both Courts below so found. R. 582, 642. In fact, she had a few months before the accident in question successfully gone through Lloyd's Register No. 1 periodical survey and received a certificate of seaworthiness.

The fire in the *Galileo's* bunkers concededly made the vessel unseaworthy. Any such fire in a ship, of course, renders a vessel "unseaworthy" in the broad sense in which the term is sometimes used.

The assertion frequently made in Petitioners' brief that "unseaworthiness" caused the fire is not accurate. The fire rendered the vessel unseaworthy. The parties agreed in the Court below that the proximate cause of the loss was the fire. R. 642. And there can be no doubt about it, as both Courts found.

The libels filed by the Petitioners made no allegation of unseaworthiness in any particular.

The *Galileo* was regularly employed in service between New York, Boston, Hull and Newcastle and was home in Hull every few weeks. R. 293.

The owners maintained a Marine Superintendent and a Superintending Engineer at Hull. Oxtoby, the chief engineer of the vessel, was responsible to Mr. Brackenbury, the owners' Superintending Engineer at Hull, to whom he re-

ported in writing at the conclusion of every round voyage. R. 308, 481, 461, 462; *Exhibit* 29, p. 580.

The owners did not have any Marine Superintendent or Superintending Engineer at New York. R. 304, 305, 337, 461, 462. At New York the captain of the vessel was in complete charge respecting all matters dealing with repairs, stowage of cargo, and supplies. R. 337, 339, 340, 346, 347. The chief engineer, under the captain, had complete charge of the coal and the places for its stowage. R. 336, 337, 342, 343, 458, 462, 304, 305, 259, 260.

Oxtoby was an engineer of 33 years' experience. He had held a chief engineer's license since 1902 and had actually served as a chief engineer on steam vessels for 14 years. R. 292, 293. Brackenbury had known Oxtoby for 20 years and regarded him as a competent engineer. The owners had given Oxtoby adequate instructions regarding the care of coal. Exhibit G, R. 575. See also R. 589.

The freight agent of the owner in New York is Ellerman's Wilson Line, New York, Inc. It was not a "managing agent." R. 334, 336. The function of this agent at New York was limited practically to the solicitation of cargo and the collection of freight. It had no duties regarding the inspection of coal, which was entrusted by the owner, in accordance with the usual custom, to Oxtoby, the chief engineer. R. 375, 421, 438, 458, 471.

The *Galileo* arrived in New York on August 16, 1926, with about 100 tons of bunker coal remaining from her previous voyage in #3 shelter deck and about 160 tons in #3 'tween deck bunkers.

It had been expected that the steamer would not take any additional coal at New York, because it was proposed to lay her up upon her return to Hull, to install some addi-

tional refrigerating apparatus. R. 300, 301, 261, 262, 457, 458.

After arrival in New York, and on August 20th, the owner sent a cable to the New York freight agents to take 850 tons of additional bunkers, to be transferred at Hull to the *Francisco,* a sister ship. *Exhibit* D, R. 572. This order was communicated to the master and by him passed on to the chief engineer. It was decided by the captain and chief engineer to carry this additional bunker coal in the temporary bunkers in #3 'tween deck and #3 shelter deck. R. 301, 304, 305, 263, 266, 267, 268, 272. No one else participated in this decision. R. 272. Neither the owners nor any of their shore freight representatives knew anything about it.

The coal remaining in temporary bunkers in #3 shelter deck and #3 'tween deck could have been shifted into the permanent bunkers of the *Galileo* if the chief engineer and the master had so decided. R. 312.

When the additional coal was being loaded into the temporary bunker in #3 'tween deck on the morning of August 25th, the coal stevedores who were down in #3 'tween deck bunker trimming the coal complained to their head man, who in turn complained to Magarelli, the foreman of the stevedores, that some of the coal remaining in the bunker had become heated. R. 329-331. Magarelli went down himself and verified this information. At this time the spontaneous combustion in the coal had proceeded to the point where even the surface of the coal pile burned the boots of the coal trimmers. R. 307. In fact, a strong odor of coal gas, as a result of the combustion on the *Galileo,* was detected by Magarelli on a coal boat alongside the vessel. R. 331. The odor of coal gas proves that some of the coal had reached the ignition point. R. 485.

Magarelli returned to the deck and reported the whole matter to Oxtoby, the Chief Engineer. R. 330. Oxtoby said that the coal was all right, but did not go down into the 'tween deck, and ordered Magarelli to "Carry on." R. 307, 308, 330, 331. The conversation between Magarelli and Oxtoby occupied about two minutes.

The bunkering proceeded and in a very short time the old hot coals, as a result of Oxtoby's negligence, were entirely covered by the new coal.

Following the covering of the old coal with the new coal, it was, of course, impossible for anyone to learn of the heated coals underneath, which were completely covered up by the large supply of new coal. R. 589.

On August 28th at 12:50 p. m. the vessel proceeded to sea. Concededly at this time the vessel had a fire in #3 'tween deck bunkers, for within six hours of sailing, a serious fire was discovered and the vessel was turned around and proceeded back to New York. In the effort to put out the fire a large quantity of water was pumped into the vessel, which eventually turned over and sank. All but a small part of her cargo thus became a total loss from fire.

The Opinions of the Courts Below.

Both Courts below concurrently found:

1. That the proximate cause of the loss was the fire.

2. That the proximate cause of the fire was the negligence of Chief Engineer Oxtoby.

3. That at the time of sailing the vessel was unseaworthy because Oxtoby had loaded new coal on old coal which had become heated and was giving off gases.

4. That no design or neglect of the owner had contributed to the disaster.

5. That the Fire Statute (R. S. 4282) constituted a defense to the owner because the fire had been caused without any neglect or design on the part of the owner of the steamer.

6. That the Fire Statute differs from the Harter Act in that the Harter Act imposes as an express condition of exemption from liability thereunder that the owner exercise due diligence to make the vessel seaworthy, whereas the Fire Statute contains no such provision, but grants exemption on condition that the fire be not caused by the design or neglect of the owner.

7. That the Respondent did not waive the protection of the Fire Statute in the bills of lading and contract itself into unlimited liability, but on the contrary had expressly contracted in each of the bills of lading that it should have the benefit of the Fire Statute.

Contentions of the Petitioners.

Petitioners' contentions, as we understand them, are as follows:

1. That the Fire Section of the Limited Liability Act of March 3, 1851, is not a defense because, owing to Oxtoby's negligence, the vessel was unseaworthy at the commencement of the voyage and seaworthiness is a condition precedent to any relief under the Fire Statute.*

---

* Compare this contention with the following statement at page 56 of Petitioners' Brief.

"It is obvious, of course, that both the British and American Fire Statutes do apply to unseaworthy vessels in so far as the loss results from fire and not from unseaworthiness."

2. That in any event the Respondent made "personal contracts" in the form of bills of lading with the Petitioners, containing an "express warranty of seaworthiness," and thus waived the protection of the Fire Statute and contracted itself into an unlimited liability for fire.

The basis for this second contention is inaccurately and unfairly set forth, as we will show under the Second Point of this Brief, *infra*, 42. The purported quotation from one of the bills of lading contained at page 8 of Petitioners' Brief is a complete distortion of the contents of even that bill of lading. *Infra*, p. 46.

Summary of Argument.

I. The decree should be affirmed on the concurrent findings of the lower Courts on all issues tried. Petitioners' libels merely alleged the shipment of cargo in good condition and the failure to deliver at destination. Thus, the libels were simple suits for breach of contract. No claim of negligence or unseaworthiness was alleged.

The answer of the Respondent was that the goods were lost in a fire and that the Fire Statute (R. S. 4282) constituted a complete defense. The Fire Statute is quoted at page 15, *infra*.

At the trial the Respondent showed, and both Courts below found, that the loss was caused by fire. The Petitioners endeavored to show that the *Galileo* was unseaworthy in various physical respects and that the owners had been personally negligent. All of these contentions were rejected by both Courts.

In the Circuit Court of Appeals the parties agreed that the fire was the proximate cause of the loss. R. 642.

Concededly the *Galileo* was unseaworthy *because of the fire.*

Both Courts below found that the proximate cause of the fire was the gross negligence of Chief Engineer Oxtoby in loading new coal in #3 temporary bunker on top of coals remaining from a previous voyage which were heated and giving off gases.

Both Courts also found that no design or neglect of the owner contributed in any way to the disaster.

The Petitioners contended in the District Court that the Respondent had waived the Fire Statute by the provisions of the bills of lading. R. 591. The Petitioners made no claim in the District Court that the bills of lading constituted "personal" contracts containing "an express warranty of seaworthiness."

In the Circuit Court of Appeals the Petitioners asserted that the bills of lading covering the Earle & Stoddart, Inc. and Sanday & Co. shipments were "personal" contracts, R. 647, but made no such claim regarding the balance of the shipments. See Appendix A of this Brief, which quotes in full Point V of Petitioners' Brief in the Circuit Court of Appeals.

The Circuit Court of Appeals found it unnecessary to make any finding as to whether or not the Earle & Stoddart and Sanday & Co. shipments were "personal" contracts. R. 647.

Both Courts below found that the owner had not made any express warranty of seaworthiness, had not waived the Fire Statute, but on the contrary had expressly contracted in the bills of lading that all shipments were subject to the provisions of the Fire Statute. *Opinion of the*

District Court, R. 591; *Opinion of the Circuit Court of Appeals*, R. 647; *Second Point, infra*, p. 42.

These simple issues were the only ones tried in the Courts below. In accordance with the usual rule, concurrent findings of the lower courts will not be disturbed.

II. The Limited Liability Act of March 3, 1851, c. 43, 9 Stat. 635, as amended, quoted *infra*, p. 15 constitutes a complete defense to the owner of the *Galileo* for the fire.

It is immaterial under the Fire Statute how, where or at what time the fire is brought about "unless such fire is caused by the owner's neglect or design." This rule is well settled in this Court:

> *Moore et al.* v. *American Transportation Co.*, 24 How. 1;
> *Walker* v. *Transportation Co.*, 3 Wall. 150;
> *Craig* v. *Continental Insurance Co.*, 141 U. S. 638;
> *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589, 602, 603;

and other cases, *infra*, pp. 22-26.

The Fire Statute was enacted as a result of a fire which occurred on the *Lexington* in 1840 due to unseaworthiness before leaving port, and in order to make the American law the same as the English law. *Moore et al.* v. *American Transportation Co.*, 24 How. 1, 38. Thus the very case which led to the passage of the Fire Statute was one involving loss by fire when the vessel was unseaworthy upon sailing.

The American Fire Statute was taken from an earlier British Act (26 Geo. III, c. 86) as was pointed out in *Norwich Co.* v. *Wright*, 80 U. S. 104, 117, and the present British

Statute (57 & 58 Vict., c. 60, Sec. 502) is very similar to the American Statute.

The British Fire Statute is quoted *infra*, p. 34. Under British law it is well established that the owner of a vessel unseaworthy at the commencement of the voyage, in the case of a fire occurring without his fault or privity, is not liable for the fire. See authorities *infra*, p. 35.

All the authorities in this Court show that seaworthiness is not a condition precedent to the shipowner's receiving the benefits of the Fire Statute or other sections of the Limited Liability Act.

Under the Limited Liability Act a shipowner is entitled to complete exoneration for fire, if caused without his design or neglect, and in any event to limit his liability to the value of the vessel and freight, if the loss occurred without his privity and knowledge. Whether or not the vessel was seaworthy is immaterial. Authorities, *infra*, p. 29.

There is a vital difference between the Limited Liability Act and the Harter Act. The Harter Act is quoted *infra*, p. 26. Congress made it a condition to the shipowners' obtaining the benefits of the Harter Act that the owner should exercise due diligence to make the vessel seaworthy.

Congress, in passing the Limited Liability Act in 1851, imposed no such condition.

Congress, in passing the Harter Act in 1893, expressly provided that none of the provisions of the Harter Act should be held to modify the provisions of the Fire Statute. *infra*, p. 27.

Congress, therefore, has made a special policy for losses due to fire.

Most of the long quotations in Petitioners' Brief are from Harter Act cases, which obviously have no materiality

here. Petitioners have fallen into the confusion on this point against which the Circuit Court of Appeals warned them. R. 645.

The decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, does not stand for the proposition stated by the Petitioners, but supports the decisions below. *Infra*, pp. 36-39.

There is no case in the books holding a shipowner liable for a fire where there has not been a finding by the court that the shipowner's personal neglect was the cause of the fire. Authorities, *infra*, p. 29.

III. The statement made repeatedly in Petitioners' Brief in this Court that Respondent made "personal" contracts containing "express warranties of seaworthiness," has no basis in the record.

Respondent did not make any contract, "personal" or otherwise, with the Petitioners containing an express warranty of seaworthiness. *Infra*, pp. 42-45.

Petitioners' attempt to invoke here for the first time the doctrine laid down in *Pendleton* v. *Benner Line*, 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, that where a shipowner has *himself* signed a private contract of charter party containing an express warranty of seaworthiness, such contract is regarded as "personal" to the owner and he may not limit his liability for any breach of the express warranty of seaworthiness. Three things are necessary in order to make this doctrine available.

(1) The contract must be personally signed by the owner, and

(2) The contract so signed by the owner must contain an express warranty of seaworthiness, and

(3) The loss must be due to unseaworthiness and not fire.

None of the conditions ex sted here.

Petitioners did not contend in the District Court that any of the bills of lading were "personal" contracts. R. 591. In the Circuit Court of Appeals the Petitioners claimed that *only* the bills of lading covering the shipments of Earle & Stoddart, Inc., and Sanday & Co. were "personal" contracts. R. 647. See Point V of Petitioners' Brief in the Circuit Court of Appeals, quoted as Appendix A of this Brief.

There is nothing in the record to support this new theory of the Petitioners.

There were 238 bills of lading covering the shipments. In no case was a bill of lading signed by the Respondent or any of its officers or managers, who were in England. Respondent's freight agent at New York was Ellerman's Wilson Line New York, Inc., a Maryland corporation, who signed 66 of the bills of lading "As Agents." The remaining 172 bills of lading were signed by various railroad agents and steamship companies as initial carriers throughout the United States and elsewhere, and delivered to the shippers at those points. *Infra,* pp. 42, 43, 45.

The doctrine of "personal contract" has never been applied to bills of lading, but has been limited to private charter parties, so far as carriage is concerned. *Infra,* p. 44.

This Court has issued a warning against too liberal an attribution to shipowners of contracts not personally theirs. *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334.

As none of the bills of lading constituted "personal" contracts of the shipowner, the terms of the bills of lading are immaterial under the Limited Liability Statute.

Assuming, which we deny, that any of the bills of lading constituted "personal" contracts, the question remains as to what the contract was in respect to obligations assumed.

This Court has definitely held that only an express contract between the parties waiving the Fire Statute can take a case out of the Statute. *Walker* v. *Transportation Co.*, 3 Wall 150, 154.

The bills of lading did not contain any such contract as the *Walker* case declared was necessary; did not waive the Fire Statute, and did not constitute an agreement by the owner to assume unlimited liabilities. *Infra*, p. 45.

Out of the 238 bills of lading issued, 66 of the bills of lading contained the exceptions clause relied on throughout Petitioners' Brief, which is printed, *infra*, p. 46. This exceptions clause did not contain any express warranty of seaworthiness. *Infra*, pp. 45, 48, 49. It was a denial, not an assumption, of liability.

All of the bills of lading issued contained an express provision incorporating the Fire Statute, which exempts a shipowner for any fire, however and wherever happening, "unless such fire is caused by the design or neglect of such shipowner."

Instead, therefore, of the shipowner having made a contract waiving the Fire Statute, the fact is that the shipowner made an express contract that he should have the benefit of the Fire Statute, and both Courts below so found. R. 591, 647.

This whole point is fully discussed. *Infra*, pp. 42-58.

FIRST POINT.

SECTION I OF THE LIMITED LIABILITY ACT OF MARCH 3, 1851, AS AMENDED, COMMONLY KNOWN AS THE "FIRE STATUTE," CONSTITUTES A COMPLETE DEFENSE TO THE OWNERS OF THE *Galileo* FOR THE NEGLIGENCE OF CHIEF ENGINEER OXTOBY.

R. S. 4282-4287 amending the Limited Liability Act of March 3, 1851, c. 43, 9 Stat. 635, is contained in the United States Code, Title 46, Sections 182 to 187, inclusive. The first and sixth sections provide:

"*Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." 46 U. S. C., s. 182.*

"*Remedies reserved.* Nothing in the five preceding sections shall be construed to take away or affect the remedy

---

* This section of the original Limited Liability Act of March 3, 1851 (the Fire Statute), read as follows:

"9 Stat. 635, Ch. XLIII.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: *Provided*, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship owners."

It was amended by omitting the proviso when carried into the Revised Statutes.

to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." 46 U. S. C., s. 187.

The other four sections of the Limited Liability Act of March 3, 1851, 46 U. S. C. ss. 183-186, confer on the shipowner or a bare boat charterer the right to limit his liability for any loss incurred without his privity and knowledge to the value of the interest of such owner in such vessel after the accident and her pending freight.

It will thus be observed that the Limited Liability Act of March 3, 1851, did three things.

First. The statute relieved the shipowner entirely for "any loss or damage" which may happen to any merchandise "shipped, taken in or put on board" any such vessel "by reason or by means of any fire happening" to the vessel "unless such fire is caused by the design or neglect of such owner."

It is difficult to conceive what language could have been employed by Congress to make it clearer that if a fire happens and merchandise is damaged by reason or by means of the fire, the owner is not liable unless such fire is caused by the owner's neglect or design. It is made very clear that it is immaterial how the fire happened unless caused by owner's design or neglect.

Second. The statute conferred upon the shipowner the right in any event to limit his liability for any loss occurring without his privity or knowledge, to the value of his interest in the ship after an accident and the pending freight.

Third. The statute reserved to those suffering injury or damage the right to proceed against the master, officers or seamen whose negligence caused the loss.

In other words, the Limited Liability Act of March 3, 1851, relieved the shipowner from the consequences of imputable negligence for loss or damage *"by reason or by means of any fire"* happening on board and permitted him in any event to limit his liability if the loss was caused without his privity or knowledge.

History of the Statute:

The Limited Liability Act of March 3, 1851, so far as the Fire Statute is concerned, was the result of the decision of the Supreme Court in the case of the *Lexington,* which was burned on Long Island Sound. That case was decided in 1848 (*New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344) and subjected the carrier to liability for a loss by fire. *Moore et al.* v. *American Transportation Co.,* 24 How. 1, 38.

In *Moore et al.* v. *American Transportation Co.,* 24 How. 1, at page 39, the Court said:

"The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to this navigation as to that of the ocean. The act was designed to promote the building of ships, and to encourage persons

engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers, etc., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight."

In *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344, which decision resulted in the passage of the Fire Statute, a suit was brought to recover for certain specie lost on the *Lexington,* which took fire and was lost on Long Island Sound while on a voyage from New York to Providence. The vessel's machinery had been originally designed to burn wood. Not long before the accident, it had been changed to consume coal, which created a higher heat. There was a neglect to secure the wooden portions of the boat exposed to this higher heat from the natural and dangerous consequences of such heat. Fire brick and sheet iron for guards near the furnace had been omitted, and on two previous occasions shortly before the accident the flue had become so reddened by intense heat as to attract the attention of the crew. For the voyage in question, cotton was stowed within eighteen inches on all sides of the flue, which had become red hot on previous trips, making it difficult to remove the cotton should a fire occur. A fire did occur, the cotton was not removed, and the vessel became a total loss. At page 394 the Court said:

"And from the mode of stowage a fire could hardly be avoided, and was to be expected and guarded against."

There can be no question from an examination of this case that the *Lexington* was unseaworthy before sailing and that the fire took place after the voyage had begun as an inevitable consequence of the prior physical unseaworthiness.

In *Moore et al.* v. *American Trans. Co.*, 24 How. 1, at page 38, Mr. Justice Nelson said:

"The decision in the case of the *Lexington*, which was burned upon Long Island Sound, led to this act of 1851. That case was decided in 1848, subjecting the carrier in case of a loss by fire. (6 How. 344.)"

Mr. Justice Nelson also wrote in the case of the *Lexington, New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344.

The Fire Statute thus represents the deliberate public policy of the United States in respect to fires happening on shipboard "without the design or neglect of the owner", following the fire on the *Lexington*. The purpose of the Act was to encourage shipbuilders and shipowners and to place our law in line with British law on the same subject. The British Fire Statute will be found *infra*, p. 34.

In passing the Harter Act in 1893 Congress expressly stipulated that the Fire Statute should not be held to be modified or repealed, thus reaffirming the policy of the Act of 1851 regarding fires and limitation of liability.

In *Walker* v. *Transportation Co.*, 3 Wall. 150, a cargo of grain owned by Walker & Co. was shipped on a vessel belonging to the Transportation Company, a common carrier. The vessel caught fire through the negligence of some of her officers and the grain was burned up. Walker & Co.

accordingly filed a libel to recover the value of the wheat. The defendant contended that while the wheat was destroyed by fire, the fire was not caused by the "design or neglect" of the shipowner and that consequently he was not liable under the Fire Statute. This defense was excepted to. The exception was overruled. The case was appealed first to the Circuit Court, where evidence was taken which showed the fire was caused by the negligence of the officers of the steamer, and then to the Supreme Court.

The Supreme Court affirmed the decrees and held that the shipowner was not responsible under the Limited Liability Statute for a fire caused by the negligence of the master and officers of the vessel, in whose misconduct the owner did not participate personally.

The opinion of the Court in this case does not show where the fire occurred nor what the negligence of the officers of the ship was which caused the fire. We have, however, examined the record filed in the office of the Clerk of this Court, from which the following facts appear:

The propeller *Falcon* was engaged in trade between Buffalo and Chicago. On October 16, 1856, the *Falcon* was in the Chicago River and took on the libelant's cargo at the libelant's warehouse. On October 17th the *Falcon* left libelant's warehouse and proceeded to the warehouse of Flint & Wheeler, also in the Chicago River, where she loaded more cargo. Then the steamer proceeded to two other places in the Chicago River to take on additional cargo. Late in the afternoon of October 17th the steamer started for the Transportation Company dock at Dearborn Street in order to take on her final cargo before commencing her voyage to Buffalo. Before the steamer could get to this dock and at

about eight o'clock, it became densely dark due to fog and smoke, and the *Falcon* tied up at the dock of Huff & Co. for the night. The safety requirements of the time required that the fires on steamers be wetted down at night. The cause of the fire was that the officers of the ship negligently failed to wet down the fires in the boiler room at night and all went to bed leaving the dangerous fires unattended. The fire thus took place owing to the negligent failure of the officers to wet down the fires and in leaving the vessel with a dangerous condition on board, which subsequently caused a fire to the ship.

This case disposes of any suggestion that an owner's defense under the Fire Statute depends on whether the fire is caused before or after the commencement of the voyage. See also *Moore et al.* v. *American Transportation Co.*, 24 How. 1.

The situation presented in the *Walker* case is identical with that of the *Galileo*. Clearly the vessel was unseaworthy from the moment the crew failed to wet down the fires and left them unattended, thus creating a "fire hazard." Equally clearly the crew of the *Falcon* had not exercised "due diligence."

In the *Walker* case, 3 Wall. 150, at page 153 the Court said:

"It is quite evident that the statute intended to modify the shipowner's common law liability for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

"By the language of the first section the owners are released from liability for loss by fire in all cases not com-

ing within the exception there made. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.

"When we consider that the object of the act is to limit the liability of *owners* of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.

"If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section, which, in terms, saves the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

"We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally" (Italics Court's).

The *Walker* case lays down the definite rule that only an express contract of waiver can take a fire case out of the statute. *Infra*, p. 48.

See also *Norwich Company* v. *Wright*, 80 U. S. 104, and *Keene* v. *The Whistler*, Fed. Cases No. 7,645. The latter case is on all fours with the present case.

In *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, 646, Mr. Justice Blatchford in discussing the case of *Walker* v. *Transportation Company*, 3 Wall. 150, stated (italics ours):

"But it was held by this court in *Walker* v. *Transportation Company*, 3 Wall. 150, in regard to the statute (Act of March 3, 1851, Sec. 1, 9 Stat. 635, now Sec. 4282 of the Revised Statutes) * * * that, *in order to make the owner of a vessel, in case of loss by fire, liable for negligence, it must appear that the owner had directly participated in the negligence.* It was there said that, as the object of the act was 'to limit the liability of *owners* of vessels,' and the exception was not, in terms of negligence generally, but only of negligence of the owners, it would be a wrong construction of the act to hold that the exception extended 'to the officers and crews of the vessels, as representing the owners'; that Sec. 6 of the act (now Sec. 4287 of the Revised Statutes) showed that it was the purpose of the preceding sections to release the owner from some liability for the negligence and fraud of the master and other agents of the owner, for which those persons were themselves liable and were to remain so; and that, in reference to fires occurring on the vessels to which the statute applied, the owner was 'not liable for the misconduct of the officers and mariners of the vessel, in which he does not participate personally.' *The same rule is applicable to the words 'privity or knowledge' in Sec. 4283.*"

In *Providence & N. Y. SS. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, Mr. Justice Bradley said, at pages 588 and 589, with respect to the Limited Liability Act of March 3, 1851:

"If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate

in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

In holding that Sec. 4283 as well as Sec. 4282 of the Revised Statutes applied to fires, Mr. Justice Bradley said, at pages 602 and 603 (italics ours):

"*In all cases of loss by fire, not falling within the exception, the exemption from liability is total.* But there is no inconsistency or repugnancy in allowing a partial exemption in cases falling within the third section; that is, cases of loss by fire happening without the *privity or knowledge* of the owners. They may not be able, under the first section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect; whilst they may be very confident of showing, under the third section, that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different.

"It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability if they fail in the first defence; and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defences. One is a more perfect defence than the other, and requires a different class or degree of proofs. That is all."

In *The Republic* (C. C. A. 2nd), 61 Fed. 109, Wallace, C. J., discussing the rule laid down in *Walker* v. *Transportation Company,* said, at page 112:

"Undoubtedly, by our statute, as by the English statutes, the common law liability of the shipowner is not

restricted in cases where his personal neglect has been an inducing cause of the loss. It was the intention of Congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own wilful or negligent acts."

In *The Strathdon* (C. C. A. 2nd), 101 Fed. 600, certain goods were damaged by fire which it was claimed originated from an overheated flue from which the cargo was ignited. The Court below had found that the fire had been thus caused but that the shipowner had not been personally negligent and hence was not liable. The Circuit Court of Appeals held that the burden was on the cargo owner to establish that the flue was overheated and that the fire had originated therefrom, and that the cargo owner had not sustained this burden.

In the course of its opinion the Circuit Court of Appeals stated at page 604 that it concurred in the main with the conclusions of fact found by the District Judge "*and fully with the conclusions of law, set forth in the very thorough and satisfactory opinion of Judge Thomas in deciding the cause*" (Italics ours). Judge Thomas said, 89 Fed. 374, 378:

"From ordinary rules, it is inferred easily that, after the loss has been shown to have arisen from fire, the burden is on those asserting that the fire was caused by the shipowner's design or neglect to prove it, and, indeed, the authorities are to that effect. * * * It is also the rule that the design or neglect of the shipowners, respecting some duty to be fulfilled by themselves, and not by their servants, is involved."

At page 380:

"Negligence may not be inferred, at least in this case, from the ultimate event, but the test is rather, what provision would a very prudent business man, skilled in such affairs, have made under the circumstances, not knowing that this particular fire would occur?"

In concluding its opinion the Circuit Court of Appeals stated (p. 606):

"The occult causes of fire are as numerous as they are mysterious. If the flue was red-hot on the night of the fire, it may or may not have been the producing cause. If, as we think, it was not, there is no satisfactory proof of the origin of the fire."

Harter Act:

There is a vital difference between the Fire Statute, and the later legislation known as the Harter Act.

The Fire Statute, R. S. 4282, became a law on March 3, 1851.

Walker v. *Transportation Co.*, 3 Wall. 150, was decided by the Supreme Court in 1865.

The Harter Act became a law on February 13, 1893.

We have already quoted on page 15 of this brief the text of the Fire Section (R.S. 4282) of the Limited Liability Act of 1851, as amended.

Sections 3 and 6 of the Harter Act read as follows:

"Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held re-

sponsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. (46 U. S. C., s. 192.)

"Sec. 6. *This Act shall not be held to modify or repeal sections 4281, 4282, and 4283 of the Revised Statutes* of the United States, or any other statute defining the liability of vessels, their owners or representatives."

It will be observed that Congress made it a condition to the shipowner's obtaining the benefits of the Harter Act that the owner should exercise due diligence to make the vessel seaworthy.

Congress in passing the Limited Liability Statute imposed no such condition.

It will also be observed that Section 3 of the Harter Act, while enumerating a number of exemptions conditioned on the owner exercising due diligence, makes no mention of fire.

On the contrary, Congress in passing the Harter Act made it clear that the Harter Act was not to modify or repeal Sections 4281, 4282 (the Fire Statute) and 4283 of the Revised Statutes. Section 6 of the Harter Act expressly so provides.

Thus Congress in 1893, with the *Walker* case on the books, reaffirmed its policy with respect to fire and limitation of liability, as expressed in the Statute of 1851.

The owner's defense here is based on the Fire Statute and not on the Harter Act. Therefore cases dealing with and defining implied warranties of seaworthiness and the due diligence required by the Harter Act have no application to this case. The Petitioners, throughout all courts, including this one, have attempted to deal with this case as if the owner were relying on the Harter Act instead of on the Fire Statute. By confusing the Fire Statute and the Harter Act and citing authorities dealing with the latter Act, the Petitioners apparently hope to persuade this Court that the owners were under an obligation to exercise due diligence to make the vessel seaworthy before they were entitled to the benefits conferred on them by the Fire Statute. Both lower courts have avoided the confusion which such practice creates; Judge Swan has warned against it. R. 645.

Notwithstanding the difference in the two statutes pointed out by Judge Swan in his opinion, the Petitioners' position, as we understand it, is that the Limited Liability Act of March 3, 1851, does not relieve a shipowner from liability for fire (R. S. 4282) or permit a shipowner who has not been guilty of privity or knowledge to limit his liability (R. S. 4283-4287) where the vessel is unseaworthy and due diligence has not been exercised to make her seaworthy by one of the crew.

If the Petitioner's position is sound, no innocent owner of an unseaworthy ship, where due diligence to make the vessel seaworthy had not been exercised, could successfully limit his liability to the value of the ship and pending freight after a loss, under R. S. 4283-4287, even where the owner had not been guilty of any privity or knowledge.

The authorities are uniformly and overwhelmingly against the Petitioners on this contention.

Moore et al. v. *American Transportation Co.*, 24 How. 1;
Quinlan v. *Pew*, 56 Fed. 111 (C. C. A., 1st);
The Annie Faxon, 75 Fed. 312 (C. C. A. 9th);
The Colima, 82 Fed. 665 (S. D. N. Y.);
The Jane Gray, 99 Fed. 582 (D. C. Wash.);
The Tommy, 151 Fed. 570 (C. C. A. 2nd);
The Richard F. Young, 245 Fed. 499 (E. D. Va.);
The Erie Lighter 108, 250 Fed. 490 (D. C. N. J.);
Patton-Tully Transp. Co. v. *Turner*, 269 Fed. 334 (C. C. A. 6th);
Hines v. *Butler*, 278 Fed. 877 (C. C. A. 4), affirming 264 Fed. 986, Certiorari denied 257 U. S. 659;
Pocomoke Guano Co. v. *Eastern Transp. Co.*, 278 Fed. 745 (D. C. Md.), affirmed 285 Fed. 7 (C. C. A. 4th);
Kitsap County Transp. Co. v. *Harvey*, 15 F. (2d) 166 (C. C. A. 9th);
Craig v. *Continental Ins. Co.*, 141 U. S. 638;
Ingram & Royle v. *Services Maritimes du Treport Limited*, (1914), 1 K. B. 541;
American-Hawaiian S.S. Co. v. *Pacific S.S. Co.*, 41 F. (2d) 718 (C. C. A. 9th).

The Petitioners in effect ask this Court to read into each section of the Limited Liability Act of 1851, as amended, the following words not now in the statute:

"provided the ship is seaworthy or the shipowner and his servants have exercised due diligence to make the vessel seaworthy."

There is no such provision in the fire section of the Limited Liability Act or in any other section, and the Courts have refused to legislate such a provision into the statute. The Congress itself in enacting the Harter Act requiring due diligence in certain cases, took particular care to provide expressly that the Harter Act should not affect the Fire Statute or the owner's right to limit liability.

Hines v. *Butler,* 264 Fed. 986, shows that even an owner who has been personally negligent in connection with a fire may nevertheless limit his liability under R. S. 4283-4287, where his conduct does not amount to privity and knowledge. See also *Providence & N. Y. SS. Co.* v. *Hill,* 109 U. S. 578, 602, 603.

The *Galileo* was unseaworthy here because of Chief Engineer Oxtoby's negligence in loading new coal on heated coals already in the steamer. In precisely the same way, the Propeller *Falcon* in *Walker* v. *Transporation Co.,* 3 Wall. 150, discussed at page 19 of this Brief, was also unseaworthy because of the neglect of the crew in allowing the fires to burn during the night while the propeller was lying at the wharf, and in leaving these dangerous fires burning without anybody to watch them. In each case the members of the crew created a fire hazard which resulted in a fire to the ship. And in each case there was no neglect on the part of the owner.

To reverse this case this Court would have to disregard entirely its decision in the *Walker* case, which has stood unchallenged since 1865.

The *Walker* case shows clearly that neither actual seaworthiness of the vessel nor due diligence is a condition precedent to the benefit of the Fire Statute, and that the

owner is entitled to exemption from liability for every loss by fire to which his design or neglect has not contributed.

Furthermore, the owner is entitled to limit his liability if he has not been guilty of privity and knowledge, irrespective of seaworthiness or the diligence of his servants.

At page 153 the Court said in *Walker* v. *Transportation Co.*, 3 Wall. 150:

"By the language of the first section the owners are released from liability for loss by fire in *all* cases not coming *within the exception there made.* The exception is of cases where the fire can be charged to the owners' design, or the owners' nelgect." (Italics ours.)

This Court, therefore, in the *Walker* case specifically rejected the contention here made that a dangerous fire left on board a vessel through the negligence of the officers before the commencement of the voyage, and which causes the loss of the vessel, deprives the owner of the benefit of Section 1 of the Limited Liability Act of 1851, the so-called Fire Statute.

The Petitioners have printed in their brief long extracts from opinions in cases involving the Harter Act, without pointing out to the Court the vital difference between the two statutes. In view of the difference between the two statutes, these Harter Act cases have no application to the present controversy.

The only case which, even on a most optimistic construction, could be said to be an authority for the Petitioners' contention with respect to the Limited Liability Act of March 3, 1851, is the case of *The Etna Maru,* 20 F. (2d) 143 (D. C. Texas), affirmed 33 F. (2d) 232, on another ground.

There was a libel *in rem* by the cargo interests against the steamer *Etna Maru*. In the District Court it appeared that the owners of the steamer had personally signed a private charter party containing an express warranty of seaworthiness. It further appeared that there was a *physical defect in the steamer itself*, which made the steamer unseaworthy.

The case was tried before Judge Hutcheson in the Southern District of Texas.

The District Court held that the owners had a non-delegable duty of furnishing a seaworthy ship, both by an express personal contract and as a matter of general law. The express personal contract signed by the owners was enough to dispose of the case.

But disregarding all the authorities on the subject of the Limited Liability Act, the District Court delivered the following dictum with respect to the Limited Liability Act, R. S. 4282-4287 (146):

"• • • that the right to limitation or exemption is to be sought in the whole text of the acts, [R. S. 4282-4287] and that they plainly mean to say that the owner may have limitation or protection against the acts of the officers of the ship, the master, and of the crew, who are in charge of and navigating his ship on her voyage, but that the owner is responsible for the proper discharge of those duties with reference to seaworthiness before the beginning of a voyage, which are properly chargeable as non-delegable duties to the owner, whether he undertakes personally to discharge them or delegates them to others."

This view of the law, of course, would deprive any shipowner of the right to limit liability even where he had been guilty of no privity or knowledge, if the ship was unsea-

worthy and due diligence had not been exercised by some of the crew to make her seaworthy.

Such is not the law by overwhelming authority. The exact contrary has been held by this Court in many cases. *Supra*, p. 29.

The case of the *Etna Maru* was appealed to the Circuit Court of Appeals for the Fifth Circuit, 33 F. (2d) 232, where the Court reached the extraordinary decision that the Limited Liability Act of 1851 *did not apply at all*, because the action was *in rem* against the steamer and not *in personam* against the owners. The Court thought that the Limited Liability Act only relieved the *owners* personally, and not the *ship*. This particular point had not even been suggested by counsel.

In the Circuit Court of Appeals the Court stated (33 F. (2d) at page 234):*

"The conclusion we reach is that, regardless of whether appellant is bound by the expressed warranty of the charter to the extent that it may not limit its liability at all, or whether it has been guilty of negligence personally, it is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against the *ship*." (Italics ours.)

In other words, the Circuit Court of Appeals for the Fifth Circuit considered that the Limited Liability Act, including the Fire Statute, only relieved *shipowners* and did not constitute a defense in an action *in rem* against the *ship*. This was the "other ground" referred to by Judge Swan. R. 646.

---

* A similar extract from the Court's opinion on page 18 of Petitioners' Brief by starting in the middle of the sentence gives a wholly erroneous impression of what the Court said.

The case before this Court involves the question of whether the Fire Statute is a defense to the *shipowner* and not whether the Fire Statute constitutes a defense to the *ship,* which was the question decided in the *Etna Maru* in the Circuit Court of Appeals.

The Circuit Court of Appeals in the *Etna Maru* was, of course, clearly wrong in holding that the Limited Liability Statute relieved only the owner, but not the ship. *Liverpool, etc., Nav. Co.* v. *Brooklyn Terminal,* 251 U. S. 48, 52, 53. See Petitioners' attempt to explain the matter on page 19 of their Brief.

The British Fire Statute and the Canadian Carriage of Goods Act:*

The British Fire Statute (Sec. 502, par. (i) of the British Merchant Shipping Act, 1894, 57 and 58 Vict., c. 60) is practically identical with the American Fire Statute. It reads:

"The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:

"(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

---

* The first English Fire Statute was 7 Geo. II, Chap. 15 (1734); the next was 26 Geo. III, Chap. 86 (1786), on which our Act was modeled. *Norwich Co.* v. *Wright,* 80 U. S. 104, 117.

The Merchant Shipping Act 1854, Section 502, changed the form of the Act somewhat and put in the words "actual fault or privity."

The Act of 1894 above quoted was merely a Consolidating Statute.

The American Fire Statute was enacted to make our law the same as that of England. *Moore et al.* v. *American Transportation Co.*, 24 How. 1, 39.

Under British law it is well established that an owner of an unseaworthy vessel, in case of a fire occurring without his actual fault or privity, is not liable for the loss. *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (1912), 1 K. B. 229; *Ingram & Royle Limited* v. *Services Maritimes du Treport, Limited*, (1914) 1 K. B. 541; *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, House of Lords, (1931) A. C. 726.

The English Courts have pointed out that if an owner of an unseaworthy ship who was not guilty of fault and privity was to be liable for a fire, it would require reading the word "seaworthy" into the British Fire Statute. The House of Lords pointed out in the *Tempus* case, *supra*, that the British law had been settled for many years. What the Petitioners seek here is to import the word "seaworthy" into the American Fire Statute.

It would be most unfortunate to upset the uniformity of British and American law on this point. *Queens Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487.

Especially is this true when, as this Court pointed out in *Moore et al.* v. *American Transportation Co.*, 24 How. 1, at page 39 (italics ours),

"The act [Limited Liability Act of 1851] was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, *and to place that of this country upon a footing with England and on the continent of Europe.* The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master,

officers, &c., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight."

The *Canadian Water Carriage of Goods Act,* which is the equivalent of our Harter Act and not our Limited Liability Act, as stated by Petitioners, is printed as Appendix C. This statute is wholly dissimilar to the American *Limited Liability* Act of March 3, 1851. Like our Harter Act, it requires a shipowner to exercise due diligence to properly man, equip and supply the ship, and to make and keep the ship seaworthy. Provided the shipowner has exercised due diligence to make and keep the vessel seaworthy, by paragraph 7 of the Act the shipowner is not liable for loss arising from *fire,* danger of the sea and other navigable waters, acts of God, public enemies, etc., "arising without their [the shipowners'] actual fault or privity or *without the fault or neglect of their agents, servants or employees.*" The Canadian Act requires not only due diligence, but makes the owner responsible for the faults of his servants. Such an Act has no bearing on the present case.

Section 7 of the Canadian Act is based on the last half of Section 3 of the Harter Act, *but* the Canadian Act adds "*fire*" to the list of perils as set forth in that portion of the Harter Act.

The mere reading of the Canadian statute, shows that the Canadian statute affords no help in arriving at a proper solution of this case under the Limited Liability Act of March 3, 1851, which, like the English statute, has no requirement of due diligence. See *Royal Exchange Assurance* v. *Kingsley Navigation Co.* (1923), A. C. 235.

The Decision in The Malcolm Baxter, Jr., 277 U. S. 323:

Throughout their brief the statement is repeatedly made by the Petitioners that the case of *The Malcolm Baxter, Jr.*, 277 U. S. 323, is authority for the proposition that unless the owner of an unseaworthy vessel and all his servants have exercised due diligence to ascertain and remedy the ship's condition before sailing, the owner will be denied exoneration and limitation of liability under the Limitation of Liability Act of March 3, 1851. The statement is categorically made many times by Petitioners that it is immaterial under the Fire Section that the owner has not been guilty of any personal neglect or design or that the owner has not been guilty of privity and knowledge, as required by R. S. 4282-4287. Petitioners assert that unseaworthiness deprives the owner of the benefit of the statute if either the owner or any of his servants, including the crew, have not exercised due diligence.

In other words, the Petitioners' position is that the owner of a vessel, who has been guilty of no fault or design, is not relieved from liability for a fire unless both he and all his servants have exercised due diligence to make the vessel seaworthy on sailing, and that, similarly, an owner cannot limit his liability to the value of the ship and freight following a disaster even though he is without privity or knowledge, unless he and his servants have exercised due diligence to make the vessel seaworthy on sailing. This extraordinary contention in the very teeth of the statute is, of course, contrary to numerous decisions of this Court and of the Courts of the various Circuits, *supra*, p. 29.

It results from a complete misconception of what this Court decided in *The Malcolm Baxter, Jr.*, 277 U. S. 323. To support their contention the Petitioners have seized upon the following excerpt from Justice Stone's opinion (331):

"Both courts below agreed that the *Baxter* was unseaworthy on sailing and that *respondent* [the owner] failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, C. 105, 27 Stat. 445, and Acts permitting Limitation of Liability to the vessel and pending freight. R. S., Secs. 4282-4289 * * *." (Italics ours.)

The language of the foregoing quotation is lifted out of the context of the opinion and put forward without any adequate statement of the facts of the case on which the statement was predicated and without pointing out that the Court expressly stated it was making no determination on the point.

The facts in the *Baxter* case are not detailed in this Court's opinion because not involved here. This Court assumed the correctness of the finding by both Courts below of the personal negligence of the *respondent*, the vessel owner. An examination of the opinion when this case was before the District Court (55 F. (2d) 312) discloses that the owner had purchased the ship after she commenced loading for a voyage, without any previous knowledge of the ship; that the vessel's hull had serious physical defects which an inspection would have disclosed, but that the owner did not provide a suitable person to inspect the vessel, which he had purchased without any waranty of seaworthiness. The owner neither looked at the ship himself nor dele-

gated to any competent person the duty of looking at the ship for him. Moreover, it clearly appears from the opinion of Judge Knox in the District Court that a leak developed before the *Baxter* was called upon to do more than be towed out in the river to Port Eads. In his opinion in the District Court (55 F. (2d) 312) at page 316, Judge Knox stated:

"While lying there [Port Eads] her captain wrote his owners that they need not be surprised if he turned up in a Gulf port."

Thus the record in the *Baxter* case clearly showed actual notice brought home to the owner in writing that the vessel was unseaworthy. The owner did nothing even after due notice of trouble, and for this he was properly condemned.

What the District Court, the Circuit Court of Appeals and this Court held in the *Baxter* case was that the personal actions of the owner of the ship were so improper and in such complete disregard of every usual safeguard that his actions amounted in law to guilty privity and knowledge required by R. S. 4283. In other words, they held that a shipowner cannot close his eyes, make no inspection himself, refuse to delegate the duty of a technical inspection to some competent person and in fact do nothing after receiving a letter from his captain that something is radically wrong with his ship. It is obvious from reading the decision of Judge Knox in the District Court, the decision of the Circuit Court of Appeals and the decision of this Court that the lack of diligence that Mr. Justice Stone was talking about in his opinion in a non-technical sense was the personal conduct and personal knowledge of the owner in the *Malcolm Baxter* case which amounted in law to the privity and knowledge required by the Statute. R. S. 4283.

Concededly, the owners of the *Galileo*, domiciled in England, knew nothing of the heated coals nor of Oxtoby's negligence and had no notice that anything was wrong with the ship, as was the case in the *Malcolm Baxter*. There were no physical defects in the *Galileo*. The sole trouble was Oxtoby's handling of the coal.

The owners of the *Galileo* had appointed a competent chief engineer to supervise the coal. Such supervision is a usual and simple duty of a chief engineer. *Walker* v. *Transportation Co.*, 3 Wall. 150. No special skill was required for such a routine matter, as Petitioners admit in their Brief, p. 40. The owner, therefore, selected a competent person to perform a usual and simple duty. The failure of the chief engineer to perform his simple duty caused the loss, but such loss is not chargeable to the owner of the *Galileo* under the Fire Statute.

There is nothing in the report of the Supreme Court in the *Malcolm Baxter* case nor in the reports of the Courts below to justify the Petitioners' contention that the words "privity and knowledge" in the Limited Liability Statute of March 3, 1851, have now been removed by judicial legislation. *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502.

Without laboring this question unduly, it should be sufficient to point out that since 1851 in all the cases where a shipowner has been held liable for a fire there has been a finding by the Court of the *shipowner's personal neglect* as a cause of the fire.

Arkell & Douglas v. *United States* (C. C. A., 2nd), 13 F. (2d) 555;

The Elizabeth Dantzler (E. D. Va.), 263 Fed. 596;

Bank Line v. *Porter* (C. C. A., 4th), 25 F. (2d) 843;

Charbonnier v. *United States,* 45 F. (2d) 166;
affirmed (C. C. A. 4) 45 F. (2d) 174;
Willfaro-Willsolo (C. C. A., 9th), 9 F. (2d) 622.

The case of *Arkell & Douglas* v. *United States, supra,* is a typical illustration of a case where the shipowner was held liable for his own personal neglect. In that case the shipowner himself, having been warned that certain bunker coals were heated, over the protest of the officers and engineers of the ship, insisted on loading further coal on top of the heated coals, with the result that a fire was caused. In other words, the shipowners themselves did almost precisely what Oxtoby did here. At page 558 the Court said (italics ours):

"The appellant has established that the fire was due to failure to shift the coal;* it has established negligence by showing a failure on the part of the appellee to shift the coal as the custom and practice dictated. The libelant has assumed the burden, and sustained it, of establishing the cause of the fire and resulting damage. It has brought home *knowledge and privity* to the owner of the vessel; at least, knowledge of the higher representatives of the owners, which forbids appellee being released from responsibility under section 4282 and 4283 of the Revised Statutes. *Craig* v. *Continental Ins. Co.,* 141 U. S. 638."

There is no suggestion in the record that the owner's freight agent at New York was guilty of "design or neglect." The cases cited at p. 61 of Petitioners' Brief are not authority for the proposition that the "knowledge and privity" of such a freight agent, even if there was any, would be the "privity and knowledge" of the owner. The cases cited have no application to the facts here.

*Which was hot.

SECOND POINT.

THE RESPONDENT DID NOT MAKE ANY "PERSONAL" OR OTHER CONTRACT WITH THE PETITIONERS CONTAINING AN EXPRESS WARRANTY OF SEAWORTHINESS AND DID NOT WAIVE THE FIRE STATUTE OR CONTRACT ITSELF INTO AN UNLIMITED LIABILITY.

At page 58 of Petitioners' Brief appears the following statement:

"In the present case, the respondent personally, through its duly authorized managing agents at New York, promised and warranted in the contracts of affreightment that the *'Galileo'* would in fact be seaworthy at the time of sailing from the loading port, New York, so far as the exercise of ordinary care could make her so. The mere breach of that personal contract, therefore, constituted neglect of the respondent corporation personally, depriving it of the benefit of the Limitation Act in 1851, of which the so-called Fire Statute is a section."

The above statement is inaccurate in every particular.

1. *The Respondent made no "personal" contract with the Petitioners. Respondent had no "managing agents" at New York.*

There were 238 bills of lading covering the shipments in this case. These bills of lading were on 18 different forms.

In no case was the bill of lading signed by the Respondent or by any of its officers or managers. They were all in England. The Respondent's freight agent at New York was Ellerman's Wilson Line New York, Inc., a Maryland corporation. The freight agent's duty was to solicit cargo. R. 335. There is no justification in the Record for calling it a "manager."

The following is a list of the bills of lading, the name of the company issuing the bill of lading, and the number of bills of lading signed by each:

Exhibit Attached to Libel	*Name of Company*	*Number of Bills of Lading Issued*
A	Ellerman's Wilson Line New York, Inc., As Agents	50
B	The Cleveland, Cincinnati, Chicago & St. Louis Railway Co.	92
C	American-Hawaiian Steamship Co.	46
D	American-Hawaiian Steamship Co. (dated at Liverpool)	1
E	The Cincinnati, Indianapolis & Western Railroad Company	4
F	Wilson Furness Line	15
G	New York and Cuba Mail Steamship Co.	1
H	Matson Navigation Company	1
I	The Chicago, Rock Island & Pacific Railway Company	10
J	The Chicago and North Western Railway Company	3
K	Chicago, Milwaukee & St. Paul Railway	5
L	The Chicago and Alton Railroad Company	1
M	Chicago Great Western Railroad Company	3
N	The New York Central Railroad Company	1
O	The Baltimore and Ohio Railroad Company	2
P	Caldwell & Company, Inc.	1
Q	Ellerman's Phoenix Line	1
R	Wabash Railway Company	1

In the District Court Petitioners made no claim that any "personal" contracts were involved. R. 591.

In the Circuit Court of Appeals Petitioners did not claim that any of the bills of lading other than those signed by Ellerman's Wilson Line New York, Inc., As Agents (the Earle & Stoddart, Inc., and Sanday & Co., Inc., bills of lading) were "personal" contracts of the Respondent. We attach hereto as Appendix A, Point V of Petitioners' Brief in the Circuit Court of Appeals showing exactly what Petitioners there contended.

See also the Opinion of the Circuit Court of Appeals on this point. R. 647.

Obviously, bills of lading signed by the various railroad agents and other steamship companies at various points in the United States on through shipments which the *Galileo* merely carried forward as a connecting common carrier, could not be the "personal" contracts of the Respondent. Petitioners do not state why they have altered their position taken below and now contend that bills of lading issued by initial carriers and other freight agents should be held to be the "personal" contracts of the connecting carrier.

The doctrine of *"personal contract containing an express warranty of seaworthiness"* has no application to bills of lading of a common carrier, which are regarded as ship's documents. The doctrine, so far as carriage is concerned, has been applied only to private charter parties actually signed or entered into by the owner himself. *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139; *Successors De Esmoris & Co.* v. *Whitney & Bodden Shipping Co., Inc.*, 39 F. (2d) 191.

The doctrine, after being developed in *Pendleton* v. *Benner Line, supra,* and *Luckenbach* v. *McCahan Sugar Co., supra,* was definitely limited by this Court in *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334.

If the bills of lading here were the "personal" contracts of the owner, then every shipment on a common carrier by sea is the "personal" contract of the owner of the ship. There is no case in the books that we can find, and Petitioners have cited none, which holds that a bill of lading of a common carrier is a "personal" contract.

In *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334, this Court said:

"We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

As none of the bills of lading constituted "personal" contracts of the shipowner, the terms of the bills of lading are immaterial under the Limited Liability Statute.

Even assuming that any of the bills of lading constituted "personal" contracts, which we vigorously deny, the necessity still remains, as Judge Swan pointed out in the Circuit Court of Appeals, of determining what the contract was in respect to obligations assumed. *The Yungay,* 58 F. (2d) 352; *The Salvore,* 52 F. (2d) 278.

2. *The bills of lading did not contain any express warranty of seaworthiness, did not waive the Fire Statute, and did not constitute a contract by the owner to assume unlimited liabilities.*

As stated previously, there were 238 bills of lading issued in connection with the *Galileo* shipments. These bills of lading were on 18 different forms. Each of these bills of lading expressly incorporated the Fire Statute. Attached hereto as Appendix B is a statement showing the clause in each bill of lading which incorporated the Fire Statute.

Out of the 238 bills of lading issued, 66 bills of lading contained the following exceptions clause to which reference is made throughout Petitioner's Brief (material parts are in capitals):

"IT IS MUTUALLY AGREED * * *; THAT THE CARRIER SHALL NOT BE LIABLE, as carrier or otherwise, FOR ANY LOSS, DAMAGE, DELAY OF DEFAULT, whether occurring during transit or before, or after or during or while waiting loading, transshipment, discharge, delivery or other disposition of the goods, or on board, or in lighters or craft, or on wharf or in warehouse, at any port or place, OCCASIONED BY ANY OF THE FOLLOWING EXCEPTED CAUSES, THROUGHOUT THIS CONTRACT ALWAYS EXCEPTED; By perils of the sea or other waters, BY FIRE OR FLOOD, FROM ANY CAUSE OR WHERESOEVER OCCURRING; by barratry of the master or crew; by enemies, pirates or robbers; theft or pilferage on board, in craft, or on shore: by arrest or restraint of princes, rulers or people, riots, strikes, lockout, stoppage of labor, labor disputes or labor disturbances of any kind, or by any reasonable course of action adopted by the Shipowner or other person whomsoever in contemplation or consequence thereof or in connection therewith; BY EXPLOSION, BURSTING OF BOILERS, BREAKAGE OF SHAFTS, OF ANY LATENT DEFECT IN HULL, MACHINERY OR APPURTENANCES, OR UNSEAWORTHINESS OF THE STEAMER, WHETHER EXISTING AT TIME OF SHIPMENT, OR AT THE

BEGINNING OF THE VOYAGE, PROVIDED THE OWNERS HAVE EXERCISED DUE DILIGENCE TO MAKE THE STEAMER SEAWORTHY; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage. breakage, chafage, vermin, or by explosion of any goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods, the insufficiency of packages, or from the carriage of livestock and/or cargo on deck; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value. * * *"

"IT IS ALSO MUTUALLY AGREED THAT THIS SHIPMENT IS SUBJECT TO ALL THE TERMS AND PROVISIONS OF, AND ALL THE EXEMPTIONS FROM LIABILITY, CONTAINED IN THE ACT OF CONGRESS OF THE UNITED STATES, APPROVED ON THE 13TH DAY OF FEBRUARY, 1893, AND ENTITLED AN 'ACT RELATING TO THE NAVIGATION OF VESSELS,' ETC., AND TO SECTIONS 4281 AND 4287, EACH INCLUSIVE, OF THE UNITED STATES STATUTES."*

In the remaining 172 bills of lading covering the other shipments, the last clause above quoted, with some individual variations, reads as follows (See Appendix B):

"This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

---

* The suggestion that the words "Sections 4281 and 4287, *each inclusive*" do not embrace the intervening sections, and that the words "United States Statutes" do not refer to the Revised Statutes. is obviously without merit.

Sections 4282 to 4287 of the Revised Statutes of the United States comprise the Limited Liability Act of March 3, 1851, as amended.

Section 4282 of the Revised Statutes, which is expressly incorporated in all the forms of the bills of lading involved in this case, reads as follows:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

The precise meaning and effect of this language has been determined by this Court in *Walker* v. *Transportation Co.*, 3 Wall. 150, where it was pointed out that only an express contract to be responsible for fire could take the case out of the Statute.

In the *Walker* case this Court declined to recognize as taking the case out of the Statute, a contract in a bill of lading admitted by the shipowner, to the effect that he would be liable for a fire if caused by the neglect of his servants. See 3 Wall. 150, at page 154.

In the case at bar the shipowner instead of having contracted to waive the benefits of the fire section of the Limited Liability Act, actually made an express contract that he should have the benefit of the Fire Statute, and both Courts below so found.

In reading the exceptions clause quoted on page 46, *supra,* from the bills of lading it will be observed that this clause by no species of distortion could be said to contain an express warranty of seaworthiness. The clause is just

what it purports to be, an exceptions clause. It is a denial, not an assumption, of various liabilities.

It provides in substance that the carrier shall not be liable for any loss, damage or delay "occasioned by *any* of the following excepted causes." The clause then proceeds to enumerate the various different exceptions. The particular exception in the clause which the Petitioners try to construe as an express warranty against unseaworthiness due to fire reads as follows:

"* * *; by explosion, bursting of boilers, breakage of shafts, of any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; * * *"

Nowhere in that part of the exceptions clause just quoted is there any warranty of seaworthiness. It merely constitutes one of the exceptions which would free the owner of liability if the owner could bring itself within the particular exception.

The particular exception does not deal with fire, which is dealt with in two other parts of the bill of lading.

The owner is not relying on this particular exception, which is a good exception under the Harter Act, where, as pointed out on page 27 of this Brief, "due diligence to make the vessel seaworthy" is required as a condition precedent to relief thereunder, which condition the Fire Statute does not require.

Furthermore, the part of the exceptions clause above quoted obviously deals only with the *physical* condition of

the ship in the particulars there stated, and the unseaworthiness of the steamer therein referred to, following the rule of *ejusdem generis,* is limited to the character of things therein specified, to-wit: explosions, bursting of boilers, breakage of shafts, latent defects in hull, machinery and appurtenances. The particular clause has nothing to do with fire and would constitute no defense to an owner who sought an exemption for fire in reliance on its terms. The owner's defense to fire is found in the Fire Statute representing the fundamental law of the land.

The obvious purpose of an exceptions clause is to specify the several different circumstances under which the owner is not liable. The clause provides against liability "occasioned by *any* of the following excepted causes." Because the owner is not relieved under one exception, it does not follow the owner is not freed if he brings himself within another exception which is applicable. The clause does not purport to be, and does not in fact constitute, a contract of express warranty of seaworthiness. It is a denial, not an assumption, of liability.

If the exceptions clause stood alone, we do not think that the construction contended for by the Petitioners could be a possible interpretation. The *Galileo* bills of lading, however, do not stop there. The bills of lading each contain a clause reading, with slight variations, substantially as follows (See Appendix B):

"This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

The clause just quoted, incorporating in the *Galileo* bills of lading, among others, Section 4282 of the Revised Statutes, was the equivalent of saying,

"The shipowner shall not be liable for fire unless caused by the shipowner's personal design or neglect."

In light of the *Walker* case, 3 Wall. 150, how can anyone reasonably contend the owner has made an express contract taking the case out of the Statute?

It must be borne in mind that the Petitioners are contending under this point that the shipowner made an express "personal" contract in the bills of lading, waiving the provisions of Sections 4281-4287, inclusive, of the Revised Statutes, and that the shipowner by an express "personal" contract in the bills of lading agreed that he should not have the benefit of the exemptions contained in the Limited Liability Act, including, of course, the right to limit liability.

This is not a case where the language of some exception is to be construed against the shipowner because of ambiguity; there is no ambiguity. This is a case where it is contended that the shipowner has made an express "personal" contract waiving his statutory right to limit liability. To impose such an extraordinary and unusual contract on a shipowner, there should be a clear indication in the documents supposed to contain such a contract that the shipowner intended to waive the exemptions of a statute passed for his benefit and to assume unlimited liability. *Walker* v. *Transportation Co.*, 3 Wall. 150. There is no suggestion that the Respondent received any special consideration for assuming this extraordinary liability. Admittedly the bills of lading were the usual and customary forms used as a matter of routine by various carriers throughout the United States. There is no suggestion in the Record that the

shippers contracted for or expected such special consideration as the waiver of a fundamental law.

How can it be seriously contended here that the shipowner made a contract waiving his statutory rights, when the very contract claimed to be the waiver contains an express provision that the shipowner shall have the benefit of the statute?

In *The Poleric*, 17 F. (2d) 513, affirmed 25 F. (2d) 843, the exceptions clause, after enumerating the various exceptions, *including fire*, ended with the following provision:

"and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."

The clause just referred to in the *Poleric* bill of lading was held to constitute a waiver of the Fire Statute.

The bills of lading in the *Galileo* contained no such provision as that just quoted from the *Poleric* case, but on the contrary, contained an express provision that the shipowner should have the benefit of Section 4282 of the Limited Liability Act.

A comprehensive discussion of the fire section of the Limited Liability Act, R. S. 4282, and whether or not it has been waived by the provisions of a bill of lading, is to be found in the decision of the Appellate Division of the New York Supreme Court in *D'Utassy* v. *Mallory Steamship Co.*, 1914, 162 App. Div. 410, affirmed by the New York Court of Appeals, 1918, 223 N. Y. 592, without opinion.

That case was an action to recover damages caused by fire to a consignment of cotton on one of the defendant's lighters in the Port of New York while being transferred from defendant's steamer to the vessel of a connecting carrier. The defendant or carrier had pleaded the entire bill

of lading and had alleged that the fire happened without design or neglect on its part.

The opinion of the Court by Laughlin, J., states, p. 412:

"The question presented for decision is whether, by the express terms of the bill of lading, the provisions of section 4282 of the Revised Statutes of the United States have been waived by the carrier. That section provides as follows:

" 'No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.'

"These provisions were originally enacted in substantially the same form in the Act of Congress of March 3, 1851 (9 U. S. Stat. at Large, 635, chap. 43, §1), which was an act relating to the limitation of the liability of shipowners. As originally enacted, it contained a provision as follows: 'That nothing in this act contained shall prevent the parties from making such contract as they please extending or limiting the liability of shipowners'; but by the subsequent revision that sentence has been omitted. * * * It is quite plain, therefore, that by virtue of the provisions of said section 4282 of the Revised Statutes of the United States the defendant would not be liable. These statutory provisions were enacted to encourage shipbuilding (*Richardson* v. *Harmon*, 222 U. S. 96); but it is, of course, competent for a carrier to waive the statutory immunity and to extend its liability (Abbot Shipping [14th ed.] 1048; Carver Carriage by Sea [5th ed.] 36; *Matter of New York, L. & W. R. R. Co.*, 98 N. Y. 447; *Virginia Carolina Chemical Co.* v. *Norfolk & North American S. S. Co.*, L. R. [1912] 1 K. B. Div. 229). The question here is whether defendant has done so."

P. 415. "It is contended by the learned counsel for the respondent that the bill of lading should be construed strictly against the carrier. That is the ordinary rule where exemption is claimed by the carrier on the contract evidenced by the bill of lading prepared by it which the shipper is obliged to accept; but I think it is not applicable here, where there is a statutory exemption and it is attempted to hold the carrier on the theory that it has, by the bill of lading, *waived its statutory exemption.* Although the bill of lading was issued by the initial carrier, the intermediate carrier is undoubtedly bound by its provisions; but the construction of the contract is to be governed by the ordinary rules of construction with reference to the intention of the parties, and it should not be inferred, I think, that the statutory exemption from liability, which the shipper and the carrier are presumed to have known, has been waived, unless the bill of lading contains a provision on the same subject and as broad as and different from the statutory provisions, or otherwise clearly shows an intention to waive such exemption. (See *Hoffmans,* 171 Fed. Rep. 455; *The St. Cuthbert,* 97 *id.* 340; *Matter of Old Dominion S. S. Co.,* 115 *id.* 845; *Houston Direct Navigation Co.* v. *Ins. Co. of N. America,* 89 Tex. 1; *Virginia Carolina Chemical Co.* v. *Norfolk & North America S. S. Co. supra; Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578.)

The rule announced by the Appellate Division of the New York Supreme Court, approved by the New York Court of Appeals, 223 N. Y. 592, and supported by the various cases cited by the Appellate Division represents the law in this country and sets forth a sensible standard by which to determine whether or not a statutory exemption is waived by an express provision in a bill of lading.

The standard is, that it should not be inferred that the statutory exemption from liability has been waived unless the bill of lading contains a provision on the same subject

and is as broad as and different from the statutory provisions or otherwise clearly shows an intention to waive such exemption.

The Strathdon, 1898, 89 Fed. 374, affirmed 1900, 101 Fed. 600 (C. C. A. 2nd), is a direct authority against the petitioners' suggestion of waiver. In that case the *Strathdon* sailed from Java to New York with a full cargo of sugar, which was carried under a charter party and bills of lading which incorporated the terms of the charter party. The latter provided that the carrier should not be liable for loss or damage,

"occasioned by causes beyond its control; by the perils of the sea or other waters; by fire from any cause and wheresoever occurring; by collision, stranding, or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, *not resulting, however, from any carelessness or want of diligence by the owners of the ship, or any of them, or by the ship's husband or master*" (italics ours).

The libel for damage to cargo was dismissed, 1898, 89 Fed. 374. The decision of the District Court was affirmed by the Court of Appeals for the Second Circuit, 1900, 101 Fed. 600.

The Court said with respect to the conclusion by the District Court that the shipowner was not liable because of the fire, p. 603:

"This conclusion proceeded upon the ground that the shipowners were exonerated from liability by the statutes relieving them from liability for losses caused by fire occurring by the default of their servants without their own neglect; * * *."

The Strathdon would be strong authority against the Petitioners' position even if the *Galileo* bills of lading had not contained an express provision incorporating Sections 4281-4287 of the Revised Statutes.

In the case of *The Hoffmans,* 1909, 171 Fed. 455, the Court dealt with a claim for loss of twine through fire on a railroad company's barge. The question arose under a petition for limitation of liability. One of the points discussed was the contention of the shipper that the railroad company by the bills of lading waived its right to limitation of liability. One clause of the bill of lading provided:

"No carrier * * * shall be liable for any loss * * * by fire."

Judge Adams, said, p. 463:

"There does not appear to be any evidence of an intention on the part of the carrier to waive anything secured to it by agreement or by law. The case of *The Satanita,* 1897, A. C. 59, is however, relied on by the exceptant."

The Court discussed that case and then said:

"Clearly that case is not an authority for the proposition that the railroad has by its bill of lading waived the right to resort to the act for protection in a case where one of the barges (with cargo), was subjected to danger from fire."

In *Ingram & Royle Limited* v. *Services Maritimes du Treport, Limited* (1914), 1 K. B. 541, sodium had been shipped on the Steamship *Hardy.* A short time after the vessel left port, sea water got at the sodium and explosions occurred and fire broke out, causing the vessel to sink. The bill of lading contained the following exceptions:

"I. * * * fire on board * * * and all accidents, loss and damage whatsoever, from defects in hull, tackle, apparatus, * * * or from perils of the seas * * * or from any act, neglect or default whatsoever, of the pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners * * * ashore or afloat, in the management, loading, stowing, discharging, or navigation of the ship or other craft or otherwise, the owners * * * being in no way liable for any consequences of the causes before mentioned.

"II. It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative failing a class the exercise by the shipowners * * * or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfillment of every duty, warranty or obligation, and whether before or after the commencement of the said voyage."

It was contended at the trial before Scrutton, J., and the latter found, that the ship was unseaworthy at the commencement of the voyage owing to bad stowage which endangered her safety; that the goods were lost by fire within the meaning of s. 502 of the Merchant Shipping Act, 1894, without the fault or privity of the defendant, but that the Fire Statute was waived by the exceptions in the bill of lading above quoted.

The Court of Appeals, consisting of Justices Vaughan Williams, Buckley and Kennedy, reversed the decision of Scrutton, J., in so far as he had held that the bill of lading waived the Fire Statute. The Court of Appeals considered that the language of the bill of lading did not exclude the protection afforded to the shipowners by the statute and did not substitute for the statute contractual liability of the bill of lading.

At page 551 Vaughan Williams, L. J., said:

"In my opinion the contract must be clear to that effect. It is not sufficient to shew a contract which is reasonably capable of two interpretations. In order to exclude the statute, the Court must come to the conclusion that the interpretation which the cargo owners contend for is the true interpretation of the contract, and not merely a possible interpretation of it."

In none of the cases cited above was there any provision in the bill of lading expressly providing that the shipowner should have the benefit of all the exemptions contained in Sections 4281-4287 of the Revised Statutes of the United States.

With such a provision in the bill of lading, constituting an express contract that the carrier *shall have* the benefit of the statute, how can it reasonably be contended that a document containing such a provision constitutes a contract that the carrier *shall not have* the benefit of the statute?

Conclusion.

The Petition presents a simple case on concurrent findings.

A fire occurred on a steamer through the fault of its chief engineer in the performance of a usual and routine duty, without any neglect on the part of her owner. The Fire Statute by its clear terms constitutes a complete defense for the loss so caused.

The majority of the bills of lading, following the usual course of commerce were signed at different points in the United States by initial carriers and delivered to the

shippers at those points. Others were signed by the owner's freight agent in New York.

In all of these bills of lading it was made abundantly clear that the shipowner was to have the benefit of the Fire Statute and other sections of the Limited Liability Act already accorded him as part of the fundamental law of the land. The bills of lading were the usual and customary bills of lading issued by railroads and other carriers and agents. The record is barren of any suggestion that the shippers contracted for, or expected, any special or unusual protection for their shipments. The shipments were merely routine movements in the ordinary course of trade.

Thus the situation was obviously the customary one to which the fundamental law of the land, represented by the Limited Liability Act, applied.

Walker v. *Transportation Co.*, 3 Wall. 150, is a complete answer to all of the Petitioners' contentions.

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

CLETUS KEATING,
L. DE GROVE POTTER,
JAMES H. HERBERT,
RICHARD L. SULLIVAN,
Counsel for Respondent.

APPENDIX "A."

FROM PETITIONERS' BRIEF IN THE CIRCUIT COURT OF APPEALS.

POINT V.

"THE FAILURE OF RESPONDENT TO DELIVER SOME OF THE GOODS LOST AND DAMAGED ON THE 'GALILEO' WAS A BREACH OF A PERSONAL CONTRACT; TO THE LIABILITY SO CREATED THE STATUTES DO NOT APPLY."

"The many shipments described in the libel are covered by various forms of bills of lading. These bills of lading are lettered Exhibits A to R, inclusive, annexed to the libel. Appendix C annexed hereto indicates which of the clauses in those bills of lading are applicable to the issue now before the Court. *With the exception, however, of the shipments made by libellants Earle & Stoddart, Inc. and Sanday & Co., Inc., Items 1 to 9 in Exhibit S, the bills of lading were executed by other parties than the respondent.* All the bills of lading, however, contained clauses identical to those discussed under Point VI, *infra,* or they contained clauses providing substantially that the conditions of the regular form of bill of lading in use by the respondent should cover such shipments. *Consequently, except for the single point that the shipments of Earle & Stoddart, Inc. and Sanday & Co., were covered by a contract which was personally executed by the respondent, the contractual liability governing all the bills of lading is the same.* In so far as the Earle & Stoddart shipments and the Sanday & Co. shipments are concerned, however, the Statutes can have no application, because the liability of the shipowner rests upon personal contract. These bills of lading are all signed Ellerman's Wilson Line Ltd. by Ellerman's Wilson Line Inc., its 100% owned subsidiary. Such bills constitute a personal contract. See *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139. In that case, at page 149, the Court said:

'But the liability of the owners sought to be enforced here is one resting upon their personal contract; to such liability limitation acts do not apply.'

The liability, therefore, of the shipowner for these shipments cannot be disputed in any event. The liability in respect of the other shipments is equally clear, because the loss resulted from unseaworthiness and not from fire, and the Statutes have no application for that reason." (Italics ours.)

APPENDIX "B."

Bill of Lading Clauses Incorporating the Fire Statute.

---

66 bills of lading, namely, Exhibits "A", "F" and "Q", attached to the libel contained the following clause:

> "It is also mutually agreed that this shipment is subject to * * * and to Sections 4281 and 4287, each inclusive of the United States Statutes."

122 bills of lading, namely Exhibits "B", "E", "I", "J", "K", "L", "M", "N", "O" and "R" attached to the libel contain a clause reading as follows:

> "This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

46 bills of lading, namely Exhibit "C" attached to the libel, contain the following clause:

> "XVII. The shipment under this bill of lading is also subject to all the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States * * *."

2 bills of lading, namely Exhibits "G" and "H" attached to the libel, contain the following clause:

> "This shipment is subject to all the terms and provisions of * * * and of Sections 4282 to 4287, each inclusive (inclusive), of the United States Revised Statutes."

1 bill of lading, namely Exhibit "D" attached to the libel, incorporates by reference the following clause:

> "The shipment under this bill of lading is also subject to all the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States * * *."

1 bill of lading, namely Exhibit "P" attached to the libel, incorporates by reference the following clause:

> "It is also mutually agreed that this shipment is subject to * * * and to Sections 4281 and 4287, each inclusive of the United States Statutes."

APPENDIX "C."

9-10 Edward VII, Chap. 61

An Act Respecting the Water-Carriage of Goods.

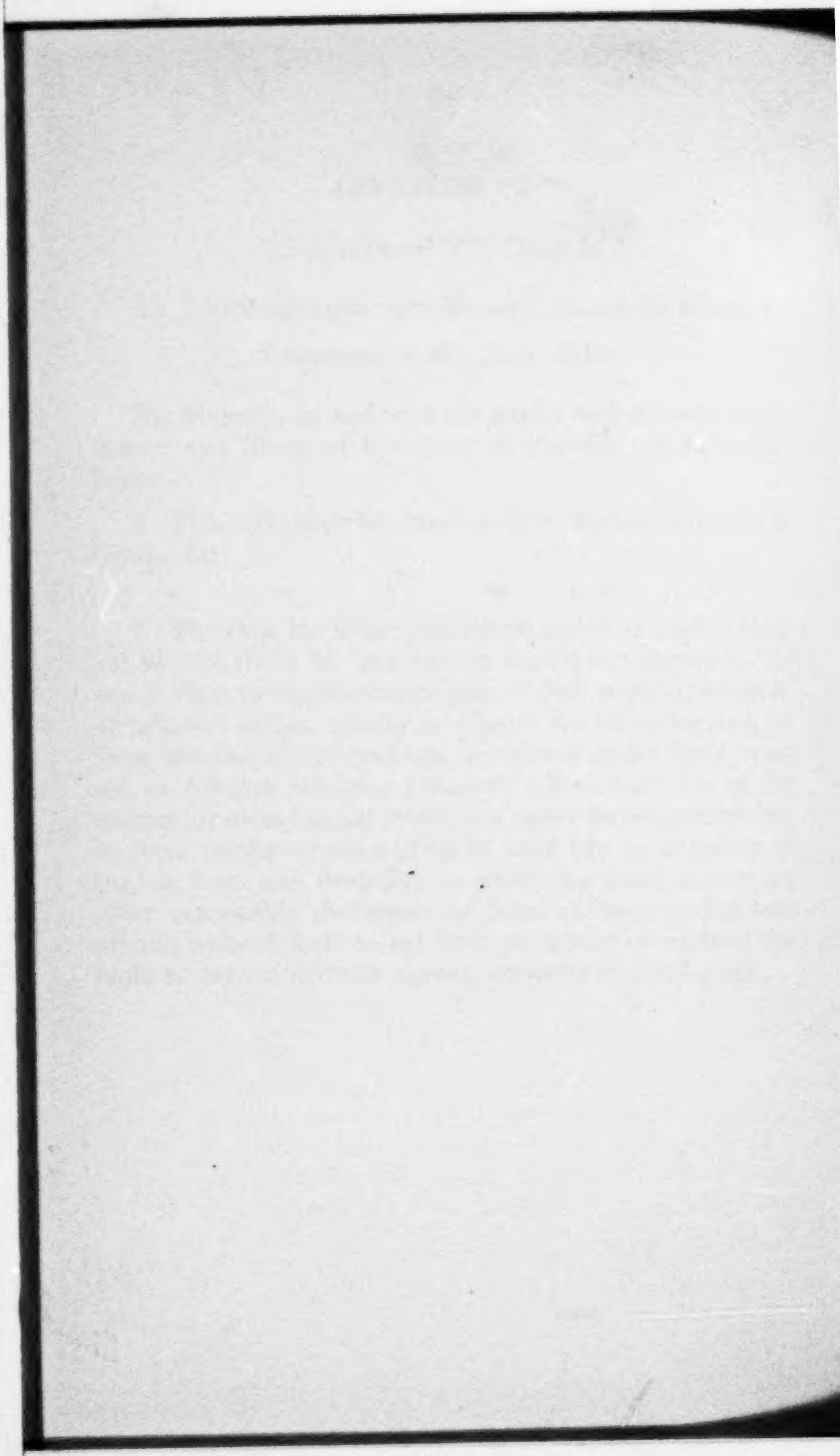
(Assented to 4th May, 1910.)

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as The Water-Carriage of Goods Act.

* * * * * *

7. The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees.



SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1932.

Earle & Stoddart, Inc., et al., Petitioners, *vs.* Ellerman's Wilson Line, Ltd.	On Certiorari to the Circuit Court of Appeals for the Second Circuit.

[December 12, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

Earle and Stoddart, Incorporated, and other owners of cargo shipped on the steamship *Galileo,* sued her owner and operator, Ellerman's Wilson Line, Limited, in the federal court for southern New York, for breach of contract to deliver at destination. The defendant pleaded in bar the fire statute, which provides: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." Rev. Stat. § 4282, Act of March 3, 1851, c. 43, § 1, 9 Stat. 635.

The District Court made these findings. Shortly after the departure from New York coal in a temporary bunker was found to be afire through spontaneous combustion. Following appropriate efforts to extinguish the fire, the vessel sank and practically the entire cargo was lost. The immediate cause of the loss was the fire, to which no design or neglect of the owner contributed. The immediate cause of the fire was the condition of the coal at the time the voyage was commenced, which rendered the vessel unseaworthy. The sole cause of the unseaworthiness was the gross negligence of the ship's chief engineer in putting a new supply of coal on top of old coal then known to be heated. The Circuit Court of Appeals concurred in these findings and affirmed the decree which dismissed the libel. 54 F. (2d) 913. This Court granted certiorari on the ground of conflict of decisions. 286 U. S. 535.

The cargo-owners concede that ordinarily the phrase in the fire statute "neglect of such owner" means personal negligence of the owner, or, in case of a corporate owner, negligence of its managing officers or agents; and that the negligence of the master, chief engineer or other ship's officers does not deprive the owner of the statutory immunity. *Walker* v. *The Transportation Co.*, 3 Wall. 150; *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, 646. The contention is that the statute does not confer immunity where the fire resulted from unseaworthiness existing at the commencement of the voyage and discoverable by the exercise of ordinary care; or, at least, that the statute does not afford immunity where the owners warrant by their bills of lading, as it is asserted they have done here, that they will "exercise due diligence to make the steamer seaworthy."

First. The fire statute, in terms, relieves the owners from liability "unless such fire is caused by the design or neglect of such owner." The statute makes no other exception from the complete immunity granted. The cargo-owners do not make the broad contention that the statute affords no protection to the vessel-owner if the fire was caused by unseaworthiness existing at the commencement of the voyage.[1] Their contention is that it does not relieve the owner if the unseaworthiness was discoverable by due diligence. The argument is that the duty of the owner to make the ship seaworthy before starting on her voyage is non-delegable and if the unseaworthiness could have been discovered by due diligence there was necessarily neglect of the vessel-owner.

[1]Such a contention with respect to the English Act was rejected by the House of Lords. Louis Dreyfus & Co. *v.* Tempus Shipping Co., [1931] A. C. 726. See also Virginia Carolina Chemical Co. *v.* Norfolk & N. A. Steam Shipping Co., [1912] 1 K. B. 229; Ingram & Royle *v.* Services Maritimes du Tréport, [1914] 1 K. B. 541. Compare Royal Exchange Assurance *v.* Kingsley Navigation Co., [1923] A. C. 235, construing the Canadian Act. The English Act relieves the shipowner from liability for loss from fire where the loss occurred "without his actual fault or privity." Merchants Shipping Act, 1894, sec. 502; 57 & 58 Vict., c. 60. The original English fire statute of 1786, 26 Geo. III, c. 86, which was the model for the American statute of 1851, contained no exception for the owner's fault or privity; the American enactment was a deliberate departure in that respect. The bill as originally reported contained an exception only for the "design" of the owner, but this was amended to read "design or neglect." See 23 Cong. Globe, 31st Cong., 2d Sess., p. 715.

In support of this contention, the cargo-owners place some reliance upon *The Edwin I. Morrison*, 153 U. S. 199, *The Caledonia*, 157 U. S. 124, and *The Carib Prince*, 170 U. S. 655. Those cases enunciate the rule that in every contract of affreightment there is, unless otherwise expressly stipulated, an implied warranty of seaworthiness at the commencement of the voyage. The warranty is absolute that the ship is in fact seaworthy at that time, and the liability does not depend upon the knowledge or ignorance, the care or negligence of the shipowner or charterer. Obviously, those cases lend no support to the contention that breach of the implied warranty of seaworthiness constitutes "neglect" of the vessel-owner under the fire statute.[2]

The cargo-owners rely chiefly upon *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, and *The Wildcroft*, 201 U. S. 378. Those cases involved the construction of the Harter Act; and the language there employed is different. The Harter Act provides in § 3 that the vessel-owner shall not be liable if he "shall exercise due diligence to make the said vessel in all respects seaworthy." And under that Act the requirement of due diligence is not satisfied if there is negligence on the part of any of the ship's employees. *International Navigation Co.* v. *Farr & Bailey Mfg. Co., supra.* But the Act does not purport to create any general duty on the part of shipowners. Its requirement of due diligence is imposed as a condition of securing immunity from liability for certain kinds of losses, like those due to errors in navigation or management. That the provisions of the Harter Act do not refer to liability for losses arising from fire is made clear by section 6 which declares that the Act "shall not be held to modify or repeal sections 4281, 4282, and 4283 of the Revised Statutes,"—section 4282 being the fire statute. The courts have been careful not to thwart the purpose of the fire statute by interpreting as "neglect" of the owners the breach of what in other connections is held to be a non-delegable duty.[3] Nothing contained in the opinion of

[2]Compare also Christopher v. Grueby, 40 F. (2d) 8, 12-13, cited in behalf of the cargo-owners, which deals with the liability of the shipowner to seamen for failure to provide a seaworthy vessel; and Bethlehem Co. v. Gutradt Co., 10 F. (2d) 769, likewise cited, which deals with the responsibility of the shipowner, apart from statutory exemption, for loss arising from the default of a shipbuilder on a contract to repair.

[3]In all the cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based

this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, is to be taken as indicating a different view.

Second. No provision in any bill of lading deprives the vessel-owner of the protection given by the fire statute. There are 238 bills of lading on 18 different forms. In no bill of lading is there an express warranty of seaworthiness. In each, there is a provision expressly incorporating the fire statute. Many of the bills of lading contain also this provision: "It is mutually agreed that . . . the carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, . . . occasioned by fire or flood, from any cause or wheresoever occurring; . . . by explosion, bursting of boilers, breakage of shafts, of any latent defect in hull, machinery, or appurtenances, or unseaworthiness of the steamer, whether existing at the time of shipment, or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; . . ." So far as loss from fire is concerned, the quoted provision leaves the area of personal neglect unchanged, adding nothing to the obligations of the vessel-owner. And in view of the express incorporation of the fire statute in the bill of lading, the provision is not to be construed as a waiver of the statutory immunity for loss by fire.[4]

---

their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act. The Elizabeth Dantzler, 263 Fed. 596; Hines *v.* Butler, 278 Fed. 877; Williams S. S. Co. *v.* Wilbur, 9 F. (2d) 622; Arkell & Douglas *v.* United States, 13 F. (2d) 555; Bank Line *v.* Porter, 25 F. (2d) 843; Petition of Sinclair Navigation Co., 27 F. (2d) 606; United States *v.* Charbonnier, 45 F. (2d) 174; The Older, 1 F. Supp. 119. In The Etna Maru, 20 F. (2d) 143, the District Court was of opinion that the fire statute did not confer immunity where the loss was due to unseaworthiness existing at the beginning of the voyage. As an alternative ground of decision, however, the court held that the vessel-owner had not overcome a presumption of personal neglect, arising from the fact of unseaworthiness. On appeal the case was affirmed, 33 F. (2d) 232, but apparently on the ground that the fire statute, like the statutes limiting the extent of liability, leaves the owner liable, in any event, up to the value of the ship. But compare The Rapid Transit, 52 Fed. 320, 321. Insofar as the decision rests on the ground advanced by the cargo-owners here, it cannot be approved.

[4]Compare The Strathdon, 101 Fed. 600, 602; The Hoffmans, 171 Fed. 455, 462-463; The Yungay, 58 F. (2d) 352, 357; D'Utassy *v.* Mallory Steamship Co., 162 App. Div. 410, 412-414, affirmed *per curiam* 223 N. Y. 592; Louis

Third. There was no personal contract of the vessel-owner superseding the fire statute. The cargo-owners invoke the rule announced in *Pendleton* v. *Benner Line,* 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139. Those cases have no application here. They declare that the statutes limiting the amount of liability of a shipowner to the amount or value of his interest in the vessel and her freight then pending (Act of March 5, 1851, c. 43, § 3, Rev. Stat. § 4283; Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57) do not apply to personal contracts of the owner.[5] Here the inquiry is not whether there was a "personal contract," on which the shipowner can be held to the full amount of the loss, but whether he can be held liable at all. He cannot be held liable unless by agreement, or otherwise, he has waived the benefit of the fire statute. The only basis for the claim of waiver is the bill of lading. What has already been said concerning their provisions disposes of that inquiry.

Moreover, the rule announced in the *Pendleton* and *Luckenbach* cases has been applied by this Court only to private charter parties executed by the owner. The bills of lading, which are said to contain "personal contracts," were not executed by the respondent or by any of its officers or managers. They were given, in large part, by agents of railroads or other steamship companies and are to be regarded merely as ship's documents. Compare *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U. S. 334, 336.

The District Court was right in dismissing the libel, and the decree of the Circuit Court of Appeals is accordingly

Affirmed.

Dreyfus & Co. *v.* Tempus Shipping Co., [1931] A. C. 726; Ingram & Royle *v.* Services Maritimes du Tréport, [1914] 1 K. B. 541. With these cases compare The Poleric, 17 F. (2d) 513, 514-516, affirmed *sub. nom.* Bank Line *v.* Porter, 25 F. (2d) 843; Virginia Carolina Chemical Co. *v.* Norfolk & N. A. Steam Shipping Co., [1912] 1 K. B. 229.

[5]See, also, Richardson *v.* Harmon, 222 U. S. 96, 106. Compare In re Pennsylvania R. R. Co., 48 F. (2d) 559, 566; The No. 34, 25 F. (2d) 602, 607; The Soerstad, 257 Fed. 130.